

THE MODERN LAW REVIEW

Volume 13

October 1950

No. 4

BIGAMY AND THE THIRD MARRIAGE

There was an old party of Lyme
Who married three wives at one time.
When asked: 'Why the third?'
He replied: 'One's absurd,
And bigamy, sir, is a crime.'

THE humour of the limerick lies in its insistence upon the literal meaning of the word 'bigamy'. Although this meaning is not adopted by the law, it was very nearly adopted in a somewhat different context by the Court of Criminal Appeal in *Treanor* (1939).¹ In that case the court held that the defence of seven years' absence given by the statute,² being there conferred only upon a 'person marrying a second time', was not available to a person who married a third time. This decision has now been departed from by the same court in *Taylor* (1950),³ and although the latter decision is undoubtedly right as a matter of law, it reveals a serious lacuna in the law of bigamy.

The facts of *Treanor* were as follows:—

1916: T. married Bridget.

1918: He deserted her, and there was no evidence that, at any material time since, he knew that she was alive.

1930: T. went through a form of marriage with Lilian.

1937: He deserted Lilian.

1938: He went through a form of marriage with Kathleen.

T. was indicted for that, being married to Bridget, he had married Kathleen. It was shown that Bridget was in fact alive in 1938. T. pleaded that Bridget had been continuously absent for seven years and that he did not know her during that time to be

¹ [1939] 1 All E.R. 330; [1939] W.N. 29; 160 L.T. 286; 55 T.L.R. 348; 27 Cr.App.R. 35.

² Offences against the Person Act, 1861, s. 57: 'Whosoever, being married, shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in England or Ireland or elsewhere, shall be guilty of felony, and being convicted thereof shall be liable to be kept in penal servitude for any term not exceeding seven years . . . : Provided, that nothing in this section contained shall extend to any second marriage contracted elsewhere than in England and Ireland by any other than a subject of Her Majesty, or to any person marrying a second time whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to be living within that time, or shall extend to any person who, at the time of such second marriage, shall have been divorced from the bond of the first marriage, or to any person whose former marriage shall have been declared void by the sentence of any court of competent jurisdiction'.

³ [1950] 2 All E.R. 170.

alive. It was held that the defence did not avail, because according to the statute the defence availed only 'to any person marrying a second time', whereas the marriage to Kathleen was a third marriage. Lord Hewart C.J. said: 'We treat this proviso as meaning not one word more than it says, and we are not in the least provoked by the arguments, put forward with ingenuity by counsel for the appellant, concerning what might arise in some fantastic state of affairs'.

This decision was dissented from by the full Court of Criminal Appeal, consisting of seven judges, in *Taylor*. Morally the latter case was even worse than *Treanor*, for Taylor had gone through no fewer than four bigamous ceremonies of marriage, taking the word 'bigamous' in its de facto sense. The present indictment was in respect of the third and fourth marriages, which the prisoner had entered into after being absent from his lawful wife for seven years and without knowing her to be alive during that period. At his trial the prisoner pleaded guilty (his counsel believing that the decision in *Treanor* represented the law, and consequently that he could not plead the defence of seven years' absence in respect of a third or subsequent marriage). The prisoner wished to appeal against the sentence passed on him, and the Court of Criminal Appeal gave him leave to do so on the ground that *Treanor* needed to be considered by the full court. After argument, it was held that the full Court of Criminal Appeal was not bound by previous decisions of the court, because the liberty of the subject was involved; *Treanor* was disapproved, and the convictions were quashed.

Before discussing the question of substance, a few remarks may be made upon *Taylor* as a decision on the doctrine of precedent and on the law of procedure. The reason given on the question of precedent is of great interest, and would seem logically to be capable of application even to the Court of Criminal Appeal when sitting with the usual three judges. The Criminal Appeal Act, 1907, contains no warrant for a distinction between the powers of a so-called full court and of a court of smaller numbers. It enacts that 'the court' (namely, the Court of Criminal Appeal) shall be duly constituted if it consists of not less than three judges; accordingly a court of three judges (if no other such court is sitting) is a full court. The qualification in brackets is necessary because the Act provides that the court may sit in two or more divisions, and, if it does so, one division could not be called a full court; yet this division has the same minimum number of judges as a full court. It would be unreasonable to make the powers of a bench of three judges dependent on the question whether some other divisional court of three judges is sitting or not.⁴ It is, in fact, impossible to

⁴ Cp. *Young v. Bristol Aeroplane Co.* [1944] K.B. 718 (C.A.), where it was held that a full court of the Court of Appeal had no greater powers than any division of the court.

tell from the report of a particular case whether it is the decision of a full court of the Court of Criminal Appeal or a decision of a division of that court : *Treanor*, for example, is stated in the reports to be a decision of the Court of Criminal Appeal consisting of Lord Hewart C.J., Charles and Singleton JJ., and without reference to the cause list for the day in question it cannot be said whether any (other) division was sitting or not. Another difficulty is that the court may become or cease to be a full court during the course of the hearing, simply by the cessation or commencement of some other division of the court engaged on another case; in this event it might be necessary to look not merely at the calendar but at the clock to see whether the particular court was a full court at the moment when it pronounced its formal decision. It cannot be supposed that this consideration is relevant to the doctrine of precedent.

✗ If the decision on the point of precedent applies to a division of the Court of Criminal Appeal in respect of its previous decisions, it would seem to apply equally to a Divisional Court of the High Court in respect of its previous decisions, when that court sits in criminal cases, and when the previous decision was in favour of conviction. It would also seem to apply to the House of Lords in the same way, and to be capable of application even to civil appellate courts where the precedent case has curtailed a constitutional liberty. In this respect the decision is a welcome reaction from the tendency of recent years to make the doctrine of precedent too rigid.

✗ The procedure adopted in *Taylor* may also have a wider significance than the actual facts of the case. The prisoner had pleaded guilty, and appealed only against sentence; the Court of Criminal Appeal granted leave to appeal solely because the convictions appeared to be bad, and in the result quashed the convictions. It thus appears that an appeal against sentence may be allowed to be argued, and may have the same outcome, as if it were an appeal against conviction. It will be interesting to see whether the same freedom is allowed on an appeal from petty to quarter sessions, for here the rule is that a defendant who has pleaded guilty can appeal only against sentence, not against conviction.⁵ It is submitted that the latter rule, if strictly applied, is capable of working hardship, for the accused may not have been legally represented in the magistrates' court, and even if he were, *Taylor's Case* shows that it is not always possible for an advocate to foretell the decision of an appellate court. Since *Taylor* there seems to be a possibility of evading the rule by a fictitious form of procedure whereby an appeal that is nominally against sentence may be treated as in reality against conviction.

✓ The main purpose of this article is to consider the effect of

⁵ The present authority for this rule is the Criminal Justice Act, 1948, s. 36 (1), repeating in this respect earlier legislation.

Taylor's Case upon the law of bigamy, and whether that law is capable of improvement. The court in *Taylor* had little difficulty in showing the fallacy of the judgment in *Treanor*. It was pointed out that the words 'second marriage' occurred in the statutory definition of the crime of bigamy, so that on the interpretation given to similar words in another context in *Treanor* a person could never be convicted of bigamy in respect of a third marriage. In truth, 'second marriage' referred to the second marriage charged in the indictment, any other bigamous marriage being irrelevant.

Although the law is now settled, it must be observed that neither Treanor's nor Taylor's defence had any merits from the moral point of view. Take, for instance, Treanor. Even if he believed that Bridget, his first wife, was dead when he married Lilian, he had no reason to think that Lilian was dead when he married Kathleen. In a case of this kind it is inevitable that one or other of the subsequent marriages should morally be accounted bigamy. If, when the prisoner married his second wife, whom we will call B, he believed that his first wife A was still alive, his marriage to B was morally bigamous (though legally not so, because of the defence of seven years' absence of A⁶). If, when he married B, he thought A was dead, he must have believed himself to be contracting a valid marriage with B, and in that case when he married C he must have believed himself to be committing bigamy with C because of his supposed existing marriage with B.⁷ Either way he is morally guilty of bigamy, and it is a misfortune that at present he cannot be reached by the criminal law.

The serious social consequences of the rule are apparent. Let us suppose that the prisoner has first married A, and then carefully kept out of her way for seven years. During this period he does not hear of her, or, if he does, hears of her only in a way that cannot be proved by the Crown. If the prisoner is bigamously inclined he is now in a state in which he is a danger to the community. He can deceive B into marriage by representing himself to be a bachelor, and he can do the same a few months later to C, D, and others. In each of these cases he is punishment-proof.

There is a similar difficulty with regard to the defence recognised in *R. v. Tolson*,⁸ namely the defence of reasonable belief in the death of the lawful spouse. It is true that the court might hold

⁶ Although the defence requires that the prisoner should not during the seven years have *known* A to be alive, it does not require him positively to believe her dead, and in fact he may have believed her to be alive.

⁷ There would be an exception if he thought when he married B that A was dead, but came to know of A's continued existence before his marriage to C. In this event his marriage to C would not morally be bigamy in respect of his previous marriage to B, because the marriage to B would on the facts now known to him be void. The marriage to C would, however, be both morally and legally bigamy in respect of his previous marriage to A, for he would now know A to be still alive, so that the defence of seven years' absence would not avail.

⁸ (1889) 23 Q.B.D. 168 (C.C.R.).

that this defence does not apply where the third marriage is immoral. Suppose that the accused marries A, and then, reasonably believing her to be dead, marries B and C in quick succession. It may be said that on a charge of bigamy in marrying C the accused's defence is one of mistake; but mistake according to eight judges (speaking through Bramwell B.) in *Prince*⁹ is no defence where the act intended was, in the known circumstances, immoral. It is submitted, however, that the actual decision in *Prince* as now interpreted turned on the issue of strict statutory liability,¹⁰ and that the dicta just referred to cannot be accepted. On facts like those in *Tolson* the so-called defence of mistake is in reality a defence of absence of the requisite *mens rea*; and if the requisite *mens rea* is absent, it cannot be supplied by proof that the accused knew that he was committing an immoral act. For this reason it is submitted that the defence of reasonable belief in the death of the lawful spouse applies to a third marriage, notwithstanding that the same evil may follow from this view as follows from the decision in *Taylor*.

• It seems clear that legislation is desirable, and the only question is how it should be worded. It would not be a satisfactory change to restore the effect of *Treanor* by a statutory amendment to the effect that the defence of seven years' absence (or belief in death) shall not avail in respect of a third marriage, because that would cause injustice in a number of cases that, with all respect to Lord Hewart's opinion, are perfectly possible. For example, such a rule would cause injustice where the first marriage was dissolved by death or divorce before the second marriage, which thus becomes the valid marriage in respect of which seven years' absence is pleaded. This particular difficulty could be met by limiting the change more narrowly: it could be provided merely that the defence of seven years' absence shall not avail where the bigamous marriage that is the subject of the indictment is separated from the valid marriage by an intervening invalid marriage. Even this, however, might cause injustice in certain cases. (1) One is where the accused first marries A, then after seven years' absence marries B, after a further seven years' absence from both A and B marries C, and A and B thereupon present an appearance. Here the accused has acted within his legal rights, because even if his marriage to B was valid, as perhaps he thought it was, he has complied with the seven-years'-absence rule in respect of it. (2) Another is where the accused first marries A, then bigamously marries B and is convicted for it, and later, not having heard of A for seven years, marries C. Even if A is still alive, there is no reason why the ordinary defence should not avail in respect of the marriage to C. The only way in which the marriage to C can be regarded as morally wrongful is in respect of the desertion of B; but the law cannot

⁹ (1875) L.R. 2 C.C.R. 154.

¹⁰ Kenny, *Outlines of Criminal Law*, 15th ed. 52.

consistently blame the accused for deserting B when it refuses to attach validity to the marriage with B. (3) Yet another case is where the accused marries A, and then after seven years' absence from her marries B, believing A to be dead and his marriage to B consequently to be valid; B dies, and the accused thereupon marries C. It transpires that A has been alive the whole time. Here again the accused is morally innocent and should have the defence of seven years' absence or belief in death.

In view of these difficulties, the only way of obtaining a just conviction in a case like *Taylor* is to devise a rule that precisely covers the facts. It would be possible for Parliament to enact, by way of qualification upon the defences of seven years' absence and belief in death, that when the prisoner goes through a second ceremony of marriage during the subsistence of the first, but has the defence of seven years' absence from his first wife¹¹ or believes her to be dead, and then goes through a third ceremony with the same defence or with the same belief in respect of his first wife, the second marriage shall be deemed to be a valid marriage (notwithstanding its bigamous character¹²) for the purpose of convicting the accused of bigamy in respect of the third marriage, and for this purpose the second marriage shall be governed by the same rules as if it were a valid marriage.¹³ With this rule on the statute-book the prosecution could count against the accused (1) that, being married to A, he has married B, and also (2) that, being married to B, he has married C. Then, if the accused pleads to the first count that he thought A was dead when he married B, or had been absent from A for seven years without knowing her to be alive, he will be convicted on the second count, though in actual fact he is not married to B.¹⁴

It is no objection to this suggested rule that it would involve a legal fiction. Judicial fictions are undesirable in criminal law (though in fact it is replete with them), because the use of such fictions means that the judges change the criminal law covertly and retrospectively. A statutory fiction is not open to this criticism, for it is merely a mode of expression. The language of fiction can always be avoided by an alternative formula: for example, in the present instance it could be enacted instead that the accused can

¹¹ A similar rule would, of course, be applied where the accused is a woman, *mutatis mutandis*.

¹² Any other defect in the second marriage, *e.g.*, the fact of its being within the prohibited degrees, should invalidate it even for the purpose of the law of bigamy. The effect of the proposed statute would merely be that the first marriage would be deemed not to have taken place.

¹³ As a drafting matter it would be necessary to provide in the same way that a third marriage (*i.e.*, a second bigamous marriage) shall be deemed to be valid for the purpose of convicting of bigamy in respect of a fourth marriage, and so on.

¹⁴ It would be well to add a third count, that, being married to A, he has married C. This would take care of the possibility that the accused, after his marriage to B and before his marriage to C, came to know that A was still alive.

be convicted in the above circumstances notwithstanding that the marriage upon which the proceedings are founded as the 'first' marriage is not a valid marriage owing to its bigamous character. If the language of fiction is used, it is only because this seems to state more plainly the result that is desired to be secured. Nor would the fiction be an unreasonable one, for the effect would merely be to convict the accused of his moral wrong. The moral *mens rea* of the accused in the case put was that, thinking himself to be married to B, he married C, and the result of the fiction would be to bring the legal *actus reus* into conformity with this *mens rea*.¹⁵

The above suggestions are meant to deal only with the problem of the second bigamous marriage, and must not be taken as implying the opinion that all is well with the rest of the law of bigamy. If there is to be legislation on bigamy, the opportunity might be taken of making other changes—for example, replacing the present defences of seven years' absence and reasonable belief in death by the single defence of belief (not necessarily reasonable belief) that

¹⁵ The present article is chiefly concerned with the criminal law of bigamy, but a footnote may be added on the civil effects of a bigamous marriage. At present in England such a marriage has no civil effects, this being a supposed logical deduction from the rule against bigamy. Thus if a man marries first A and then, during the subsistence of this marriage, B, and afterwards A dies, he becomes a respectable widower and is free to marry C. He is under no obligation to his second 'wife', even though at the time of the marriage he concealed from her its bigamous nature (except that he is probably liable to her in tort for deceit), and the children of the bigamous marriage are illegitimate. In France they order these things otherwise, and better. By the Code Civil, Art. 201, 'Le mariage qui a été déclaré nul produit néanmoins les effets civils, tant à l'égard des époux qu'à l'égard des enfants, lorsqu'il a contracté de bonne foi'. By Art. 202, 'Si la bonne foi n'existe que de la part de l'un des deux époux, le mariage ne produit les effets civils qu'en faveur de cet époux, et des enfants issus du mariage'. Whatever these provisions may mean in detail, i.e., whatever in detail may be involved in 'civil effects in favour of that spouse', this much is clear, that if this were English law, 'Mrs.' Lilian Treanor would be entitled to claim maintenance as a wife, and her children would be legitimate. For English cases where foreign concepts of putative marriage have been discussed, see *Re Stirling* [1908] 2 Ch. 345; *Berthiaume v. Dastous* [1930] A.C. 79 (P.C.).

This concept of the putative marriage is already beginning to make its way in England: see s. 7 (2) of the Matrimonial Causes Act, 1937, and s. 4 of the Law Reform (Miscellaneous Provisions) Act, 1949. These statutes give to voidable marriages that are afterwards avoided the effect of conferring legitimacy upon the children. They should be extended in two directions:

(a) in the scope of application, by extending the rule from voidable to void marriages concluded in good faith by both spouses or (with more limited effect) by one spouse, maybe even with regard to legitimacy of offspring in the case of a marriage concluded *mala fide* on both sides, and:

(b) by extending the civil effect of the putative marriage at least to certain aspects of the relation between the spouses, particularly in respect of the right to maintenance. I am indebted for the references in the foregoing part of this note and for the consequential suggestions to Dr. O. Kahn-Freund.

It may be added that in Scotland, the mere fact that the bigamist continues cohabitation 'with habit and repute' with the second 'wife' after obtaining his freedom from the first marriage by the death or divorce of the first wife is enough to regularise the position with the second wife: *Campbell v. Campbell* (1867) 5 M.(H.L.) 115; *De Thoren v. Wall* (1876) 3 R.(H.L.) 28; Gloag and Henderson, *Introduction to the Law of Scotland*, 4th ed. 574.

the first marriage has come to an end, whether by death or otherwise. Another desirable step would be to abolish the present law of bigamy and in its place to use two existing offences. To explain this it is necessary to consider shortly the basis of the law of bigamy. Originally only an ecclesiastical offence, bigamy first became a crime by a statute of James I, which made it a capital felony; the chief reason seems to have been that it was regarded as akin to blasphemy. Since the change in our attitude to the subject of blasphemy, it would seem that bigamy needs re-examination. Marriage is now a secular status; any superadded religious significance should be no concern of the law. The marriage ceremony in a particular case may be entirely secular, and it is especially difficult to see why a secular ceremony should be protected by a law analogous to blasphemy.

What confuses any discussion of the law of bigamy is that bigamy frequently involves conduct upon which society cannot look with approval. Bigamy frequently involves desertion of the lawful spouse, failure to maintain the lawful wife, deception of the registrar and minister of religion, and adultery; where it is committed with a woman who is deceived as to the facts it involves something nearly approaching rape. All these factors are, however, logically irrelevant to the offence. The bigamist may have separated from his spouse amicably, and anyway desertion is not a crime. He may maintain his spouse, and anyway failure to maintain is not a crime. Although bigamy is in practice followed by adultery, there is no logical necessity about this, and anyway adultery is not a crime. If desertion, failure to maintain and adultery were crimes, it might be proper to punish bigamy also, since bigamy is perhaps conduct conducive to these other acts which on this hypothesis would be crimes. But when (for good and sufficient reasons) we do not treat as crimes the acts that constitute the real social mischief, it is surely wrong to punish bigamy merely because it is thought to conduce to them. Bigamy involving the deceit of an innocent woman, and amounting in fact to quasi-rape, certainly qualifies for a penal sanction; but the present law is not confined to this case.¹⁶

The only social mischief that is necessarily involved in every case of bigamy is the deceit practised upon those who officiate at or before the bigamous ceremony, and the consequential falsification of the marriage register. Most people would agree that this deceit, taking it by itself, would be adequately redressed by a fine; certainly the maximum 'of seven years' imprisonment now fixed by the law is wildly out of proportion to the harm done in this particular respect. Although this maximum is certainly needed for a case of quasi-rape, which is the only serious form of bigamy, the

¹⁶ For this reason it is difficult to see why bigamy was included in a statute called the Offences against the Person Act. The only possible persons offended are the first and second spouses, and neither of them is necessarily offended.

statute does not distinguish between this case and the comparatively venial offence of trying to give respectability to an illicit association and 'giving the child a name'. In failing to discriminate between the serious and trivial forms it does not give the courts a lead as to the scale of punishment. This point may be illustrated by reference to a case of 1945.¹⁷ The prisoner, after getting on well with his wife for twenty-two years and being a good husband, had an upset with her and went off to live with another woman. When the latter was going to have a child (it was not certain whether the prisoner was the father) she begged him to go through a bigamous ceremony with her, and he complied. After that he took to drink and went to pieces completely for a time, meeting a third woman and giving notice of an intended marriage to her, though nothing further came of this. The prisoner was prosecuted for bigamy. The Court of Criminal Appeal, in its judgment, said that the serious part of the offence of bigamy was the obtaining possession of a virtuous girl by the pretence of being her husband. That very serious feature, it said, was absent in the present case. The court then referred to a letter written by the lawful wife to the Home Secretary, a very pathetic document in which she begged for mercy for her husband—partly on his account, because she still believed in him, and partly on her own account, because she was receiving an army allowance which would stop if her husband went to prison for a long time. The court attached importance to this letter because the wife appeared to be the only person in the case who had been injured by the prisoner's act. After this recital of mitigating circumstances in the judgment it comes as something of a shock to find that the sentence of the court was to twelve months' imprisonment.

With all respect, is not a sentence of this severity an over-assessment of the social evil of the offence? Bigamy in a case of this type seems to be the act of a fool rather than a knave. From the point of view of civil law it is a purposeless act, because the second ceremony has no legal effect. As a means of gaining respectability it is unnecessary. If a woman lives with a married man, takes his name, calls herself Mrs., announces her marriage to him in the papers, and sends her friends wedding-cake, neither he nor she commits an offence. This being so, only an ignorant or unintelligent person would commit bigamy. It may also be observed that bigamy committed to achieve respectability is still, as it was in the days of Maule J., the crime of the poor rather than of the rich, and a symptom of inadequate facilities for divorce.

• What it needed is a reconstruction of the law of bigamy so that it becomes separated into two offences: a serious offence of quasi-rape, and a minor offence of falsification of the public records. These offences already exist on the statute-book quite independently

¹⁷ McDonald, *The Times* newspaper, March 6, 1945.

of the law of bigamy. (1) By the Criminal Law Amendment Act, 1885, s. 3 (2), it is a misdemeanour to procure by false pretences unlawful carnal connection with any woman who is not a common prostitute or of known immoral character. This provision is at present little used because the typical case of it is bigamy, which is already provided for in the law under that name.¹⁸ If the offence of bigamy as such were abolished, cases of quasi-rape could still be prosecuted under the Criminal Law Amendment Act, for whenever a man goes through a ceremony of marriage he impliedly represents to the other party (unless he states the contrary) that he is a bachelor.¹⁹ (2) If the bigamous wife realises that the marriage is invalid, or if the offender is a woman, the offence now known as bigamy should be the lesser one of falsifying the marriage register. This already exists under s. 3 of the Perjury Act, 1911, which covers the making of a false oath, or the making or signing of a false declaration, notice or certificate required under a statute relating to marriage, for the purpose of procuring a marriage. Since everyone who marries in England is required to declare that he believes that there is no lawful hindrance to his marriage, and to state his condition, this provision covers every case of intentional bigamy committed in England. The present law of bigamy is, in view of the foregoing provisions, unnecessary; it is also objectionable because it regards as a single offence, with a common maximum punishment, two types of act that belong to different moral planes. The Perjury Act is, however, open to the same objection, because it imposes the maximum punishment of seven years' imprisonment for offences under the provision just quoted; this punishment may be justified where what the accused has done amounts to quasi-rape, but not where he has merely falsified the marriage register, and the provision does not distinguish between the two offences. The punishment also stands in striking contrast to that under the Criminal Law Amendment Act quoted above, for under that Act quasi-rape of a woman who is *not* a common prostitute or of known immoral character is punishable with only two years' imprisonment. It is quite topsy-turvy that the consummated act of fraudulently procuring connection should thus carry only two years, when the false declaration, which is a mere step in carrying out the immoral purpose, and moreover a step that may not in all cases be taken, carries seven years.

¹⁸ The view may indeed be held that cases of the type of bigamy are the only ones where the provision in the Criminal Law Amendment Act can properly be invoked—I refer to cases where the false pretence inducing the connection is that the man is the woman's husband. Where the false pretence is of this kind the woman is morally innocent; but if the false pretence relates to some collateral fact, such as that the man is a foreign sovereign or the possessor of untold wealth, the woman, though deceived, is not deceived as to any fact going to the regularity of the affair, and it is at least doubtful whether a false pretence of this type is one that should attract the attention of the criminal law.

¹⁹ *Meluish v. Milton* (1876) 3 Ch.D. 27 at 35 (C.A.).

The misdemeanour under s. 3 of the Perjury Act is not included in the list of offences that are triable summarily with consent. It should be.

One advantage of the proposed recasting of the crime of bigamy is that it would get rid of the present theological atmosphere of the law: the idea that the social evil of bigamy lies in 'the profanation of a solemn ceremony'. Although this is the historical foundation of the law of bigamy, it is at the present day no more than a disturbing factor. 'One judge,' wrote Dr. R. M. Jackson, 'who was a great authority upon ecclesiastical law, will be remembered for his severity in all bigamy cases: as a pillar of the church he considered that all infringements of morality were necessarily serious offences. Whether a trial was held before this judge, or before one of his colleagues who was an agnostic, might make a great difference to the result'.²⁰ A restatement of the law of bigamy in avowedly secular terms would avoid this.

If these proposals come to be adopted, it will be necessary to fit into them the suggestion made in the earlier part of this paper for dealing with a case like *Taylor*.

Finally, the number of offences of bigamy could be greatly reduced by a system of registration of marriages similar to those that have long been in force on the Continent.²¹ In England this would require the registers of births and marriages to be linked, possibly, though not necessarily, in conjunction with the system of national registration. If every marriage were recorded on the register of births or the national register, and if every one on marriage were required to produce a recent extract from this register, bigamy would no longer be one of the easiest of all crimes to commit.

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²⁰ *The Machinery of Justice in England*, 128.

²¹ See H. Mannheim, *Criminal Justice and Social Reconstruction*, 75-6 and sources there quoted, including H.L. Deb., Mar. 28, 1944, cols. 306 ff.

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ENCOURAGING INVENTIONS BY GOVERNMENT EMPLOYEES

IN England Patent Law is still regarded as an esoteric, if highly lucrative craft. Academic lawyers rarely touch it; university law faculties and professional law-teaching bodies ignore it; economists, sociologists and political scientists seem scarcely interested.

A very different state of affairs prevails across the Atlantic, where all the leading law schools give courses in Patent Law and the law reviews devote much space to its problems.¹ Nor is Patent Law taught or discussed from a narrow angle in the United States. It is widely realised there that the problem of stimulating and rewarding inventiveness is basic in modern industrial society, and nowhere more than in a democracy since it raises in its sharpest form the whole issue of 'incentives'.

The object of this paper is to investigate the methods adopted to encourage inventions by Government employees not only in the United States but also in the Soviet Union. The study will be confined to Government employees for three reasons: first, for reasons of space; secondly, because it is desired to have the best possible basis for a comparison between the practice of the two leading industrial countries of the world; thirdly, because it is believed that from such a comparison many lessons can and should be learned by other countries, particularly countries the Governments of which are playing an ever-increasing part in the management of industry and in the direction of scientific research.

It is proposed to begin with the Soviet Union, where an overwhelming proportion of potential inventors are naturally Government employees; but it should not be forgotten that, in the United States also, the role of the Government in research has been enormously expanded in recent years and the problem of encouraging invention by Government employees has been made just as critical as it is in the Soviet Union by the necessity of developing atomic energy exclusively under public control.

THE SOVIET UNION

The first Soviet Patent Law was passed in 1924 and was closely modelled on the patent systems of Western Europe, particularly of Germany. This law sufficed for the period of the New Economic Policy (1922-1928), which was a modification of the enthusiastic socialism of the early years of the Revolution and which established

¹ See Nos. 12 and 13 of 'Law and Contemporary Problems' published by Duke University. These two numbers are entirely devoted to Patent Law.

for an avowedly interim period what would now be described as a 'mixed economy', that is, public and private enterprises existing side by side in a manner not altogether unlike that which prevails in the United Kingdom today.

In 1928, however, when the first Five Year Plan was launched, the existing Patent Law was felt to be inappropriate to the new conditions. Under the new economy, in which all major industrial activity was carried on by State enterprises, there was little that an inventor could do with his patent save sell it to the State enterprise concerned. Exploitation of the invention by the inventor himself was rendered impossible in practice even though there was no immediate change in the Patent Law. Even so, such a change was deemed necessary.

In considering what changes to make in their Patent Law Soviet planners were obsessed with the notion that the buying and selling of rights in inventions was reminiscent of capitalism and was not in accord with the new Soviet psychology. Something radical and new was needed to stimulate the inventiveness of the workers, now in most cases Government employees. The preamble to the Soviet Patent Law of 1931, therefore, makes interesting reading. It says, 'Mass inventions constitute one of the most important forms of immediate participation of the workers in socialist rationalisation of production and in the introduction of new technique into the national economy of the U.S.S.R.

'However, so far the attention paid to inventions, and especially to workers' inventions, has been altogether inadequate, owing to bureaucratic distortions, inertia, red tape and in many instances downright sabotage. In spite of the enormous importance of mass inventions to the cause of the struggle for the speed-up of industrialisation, the exploitation of inventions and the exchange of technical experience are most unsatisfactory. The work of the bodies set up to assist inventions is inadequate. The creative initiative of the worker-inventors is not sufficiently encouraged. The patent legislation which has existed until now and has protected the inventor by giving him an exclusive right to his invention no longer satisfies the aspirations of the foremost inventors.

'It has become necessary to create other forms of inter-relation between the worker-inventor and the socialist State which will be in keeping with the role of the worker-inventor as an immediate participant in socialist reconstruction. Along with the guarantees of early and full exploitation of the inventions, it is necessary to create conditions which will further mass inventions and will guarantee a proper remuneration (on a fixed scale) to the worker-inventor, securing him a number of exemptions and privileges'.

This law of 1931² created, alongside the patent, the author's

² For an explanation of the law of 1931 see 'Principles of Soviet Patent Law and Social Organisation of Inventions in the U.S.S.R.', Victor G. Olkhovsky, Vol. 17, Journal of the Patent Office Society, p. 568.

certificate, which will be explained in detail below. As a result of the fact that workers in State enterprises—and that now meant most workers—were forbidden to apply for patents but were compelled to apply for author's certificates instead, and that applications for patents from anyone were officially branded as a sign of backwardness in a socialist State, it is not surprising that within a year or two 99 per cent. of all applications were for author's certificates. There was certainly a great deal of enthusiasm on the part of the Soviet workers. For, whereas, in Tsarist times, 75 per cent. of all applications for patents came from foreigners, now less than 5 per cent. of the applications came from foreigners. On the other hand there was often more enthusiasm than inventiveness for, in the first three years of the law's existence, well over half of all the applications were rejected; and 80 per cent. of all the rejections were for want of novelty.

There was at this time no deliberate exclusion of foreigners from the Soviet patent system. Indeed, Soviet State enterprises were prepared to pay large sums for foreign technology. Foreign firms were permitted to take out patents in the U.S.S.R. These were then assigned to a Soviet State enterprise for a fixed sum or licensed on a royalty basis. There was a provision for compulsory licensing if the invention was not worked within three years of the issue of the patent. Between 1931 and 1934 Americans alone took out 155 patents in the U.S.S.R.

In fact, so far from discriminating against foreigners, the Soviet Government kept the patent system in existence solely for their benefit. For it had ceased to have any significance on the Soviet home front. It is true that foreigners were permitted to apply for author's certificates as well as patents, but naturally they preferred to take out the more familiar patent, which they could assign or license for sums fixed by contract, rather than entrust their claim for a reward to the tender graces of a Soviet compensation board.

That the law of 1931 worked reasonably well is clear from the fact that, when it was re-enacted in 1941, few changes were made.³ It is the law of March 5, 1941, taken together with the regulations of November 27, 1942 (provided for in the law itself), which is now operative. A very brief summary of this law is given below:

Section 4 provides that 'in cases where an invention is of special importance to the State, but no agreement is reached between the People's Commissariat and the patent owner concerning the transfer of the right to the invention, the Council of the People's Commissariat (now the Council of Ministers) of the U.S.S.R. may pass a resolution ordering a mandatory alienation of the patent or the issue of a licence on behalf of the agency concerned and establishing the amount of remuneration for the author'. This is of course a sweeping

³ For an explanation of the law of 1941 see 'The New Soviet Patent Law', Charles Prince, 28 J.P.O.S. p. 261.

provision, but much the same result is achieved in both the United States and the United Kingdom, although by less direct means.

Section 4 goes on to make the important provision that 'an inventor to whom a patent has been issued shall not enjoy the same privileges granted under the present statute as those who obtained an author's certificate'.

Section 5 provides that 'No patent, but an author's certificate, shall be issued in the following instances—

- (a) If the invention is made in connection with the work of the inventors in scientific research institutions, in construction bureaus, in experimental shops, laboratories and other institutions and enterprises.
- (b) If the invention is made by commission of a Government agency.
- (c) If the inventor has received pecuniary and material aid from the Government . . . for the purpose of the development of the invention'.

Section 8 provides that 'An inventor who possesses an author's certificate for some of his inventions and patents for other of his inventions cannot enjoy the privileges under the author's certificates'. This, coupled with the provisions of section 4, means that there is effective discrimination against the holders of patents.

Section 11 provides that 'Aliens enjoy the rights as provided in the present statute on an equal footing with the nationals of the U.S.S.R. on a basis of reciprocity'.

Section 13 provides that 'Those guilty of bureaucratic attitudes and red tape in the examination, development and introduction of inventions and technical improvements and of withholding the payment of the author's remuneration shall be held responsible up to removal from their positions and prosecution before the courts'.

Section 18 provides that 'It is the duty of plant managers to organise invention activities . . . to utilise to the utmost inventions and improvements which are recognised as useful . . . to assist inventors in their work and in protection of their right of authorship, to raise their technical knowledge and to give them technical advice . . . to determine the effectiveness of the invention and to pay the author's remuneration for inventions and technical improvements accepted for use in accordance with the Instruction approved by the Council of People's Commissars of the U.S.S.R. . . . and to communicate to the superior agencies all the inventions and technical improvements which may have a general importance'.

Section 19 provides that offers of inventions and technical improvements received by an enterprise, trust or People's Commissariat must be examined within ten days, twenty days or two months respectively.⁴

⁴ Industry in the Soviet Union is controlled by People's Commissariats (now Ministries). The operating units are trusts and enterprises. Hence the time allowed for investigation varies with the size of the unit.

Section 22 provides for premiums to be paid to all those who assist in getting the invention under way as well as the actual inventor.

Section 23 provides that the amount of compensation shall be determined administratively. The decision of the People's Commissar shall be final.

Section 24 provides that claims concerning violation of the administrative procedure or violation of the payment regulations shall go before the ordinary courts.

Section 25 provides that the invention must be new and useful. No definition is given, but novelty is to be determined by the Bureau of Inventions of the State Planning Commission (Gosplan), which is the Soviet equivalent of a Patent Office.

Section 37 provides that an author's certificate, but not a patent, may be issued to a whole bureau or laboratory.

Section 69 provides that if an invention is new and useful and is accepted, the inventor shall receive a remuneration depending on its technical importance, the degree of economy or other effects produced on the national economy, and the degree of completeness of the invention.

Section 70 provides that the first 10,000 rubles of the remuneration shall be tax exempt.⁵

Section 72 provides that inventors shall have the right of priority, under otherwise equivalent conditions, for appointment to a position as a scientific research worker in research institutions. This is no doubt one of the greatest privileges of all.

The regulations of November 27, 1942, draw a distinction, for purposes of remuneration, between—

- (i) Inventions.
- (ii) Technical improvements, *i.e.*, suggestions for the improvement of conditions in a given enterprise or production unit, or of a production or technical process.
- (iii) Suggestions for rationalisation, *i.e.*, suggestions of a productive-technical character which directly improve the productive process by means of more effective utilisation of equipment, material or workers, but which do not essentially change the construction or technical process of the industry. For example, the reorganisation of the shift system in a factory would fall within this category.

In addition heads of organisations are empowered to award at their discretion cash prizes for suggestions aimed at improving the organisation as a whole. Suggestions for better accounting or clerical systems fall within this category.

⁵ There are 11.20 rubles to £1, according to the official Soviet rate of exchange, although the purchasing power of 11 rubles is considerably less than £1. According to one estimate, between 60 and 100 rubles to £1 would be the true figure. See 'World Today', R.I.I.A., Vol. 6, No. 4, p. 141.

Heads of organisations may also reward inventions or suggestions which, although they do not result in any financial saving, yet improve labour conditions or safety in the factory or the quality of production.

For inventions, technical improvements and suggestions for rationalisation, the amount of the remuneration and the method of payment are determined as follows :

All figures in rubles

Amount of annual saving.	For inventions.	Remuneration.	
		For technical improvements.	For suggestions for rationalisation.
Up to 1,000 . .	30 per cent. of saving (but not less than 200)	25 per cent. of saving (but not less than 150)	12.5 per cent. of saving (but not less than 100)
1,000-5,000 . .	15 per cent. plus 100	12 per cent. plus 130	6 per cent. plus 65
5,000-10,000 . .	12 per cent. plus 250	8 per cent. plus 330	4 per cent. plus 170
10,000-50,000 . .	10 per cent. plus 450	5 per cent. plus 650	2.5 per cent. plus 350
50,000-100,000 . .	6 per cent. plus 2,500	3 per cent. plus 1,650	1.5 per cent. plus 850
100,000-250,000 . .	5 per cent. plus 3,500	2.2 per cent. plus 2,200	1.25 per cent. plus 1,100
250,000-500,000 . .	4 per cent. plus 6,000	2 per cent. plus 3,400	1 per cent. plus 1,700
500,000-1,000,000 . .	3 per cent. plus 11,000	1.5 per cent. plus 6,000	0.75 per cent. plus 3,000
Above 1,000,000 . .	2 per cent. plus 21,000 (but not more than 200,000)	1 per cent. plus 11,000 (but not more than 100,000)	0.5 per cent. plus 5,500 (but not more than 25,000)

It therefore becomes a matter of vital importance to determine the annual saving.

The regulations provide that the saving which will result from the invention is to be determined in the first place for the first twelve months of its industrial application; but the cost of re-tooling and switching over to the new method must be counted against the saving. Awards of not more than 1,500 rubles must be paid within thirty days of the confirmation of the award. If the award exceeds 1,500 rubles, either one quarter of the award or 1,500 rubles (whichever is the greater), must be paid within thirty days of the confirmation of the award. Another quarter is to be paid within six months. The balance must be paid not later than two months after the end of the first year of application of the invention. Moreover, if the saving in subsequent years is greater than in the first year, a supplementary award may be made in respect of each subsequent year up to a total of five years from the date of the application of the invention.

It is fundamental in the Soviet Union that the law relating to inventions is regarded as a part of labour law, and not as a law of industrial property as in capitalist countries. It is inevitable, therefore, that the Soviet Patent Law bears little or no resemblance to the patent legislation of Western countries but reads more like the regulations governing rewards for suggestions in the average progressive Western business firm. In fact the Soviet Patent Law is closely connected with the Stakhanovite system of encouraging increased output in industry. The importance of 'incentives' is well understood in the Soviet Union.

It would be entirely beyond the scope of this article to attempt to assess how effective the Soviet system has proved in practice. The interest of the system for us lies in the fact that it does appear to have stood the test of time. Even more important, it probably is, and has been found to be, the only satisfactory method of rewarding inventors in a fully socialised State.

THE UNITED STATES

Article 1, section 8, clause viii, of the constitution of the United States provides that the Congress shall have power 'to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries'. Patent law is, therefore, a matter for legislation by Congress and for the jurisdiction of the Federal Courts. The basis of the American system is of course similar to the British; that is to say, a patent is a form of industrial property, by which, in return for making a full disclosure of his invention to the authorities, the inventor is given the exclusive right to exploit it for a limited period. In the United States the period is seventeen years.

Nevertheless, although a patent is a form of property—and property rights are carefully safeguarded in the United States—the powers of the Federal Government in respect of patent rights are also very extensive. The fact that a patent originally issued from a Government office, as a result of statutory authority, does not in any way prevent its assignment to the Government. For, although in the United States patents can only be issued to the actual inventor, necessarily one or more natural persons, patent rights are assignable. If, therefore, the United States is entitled to the ownership of the inventions of Federal employees, either according to the ordinary principles of the Common Law governing employer-employee relationships or for other reasons to be discussed below, an assignment to the United States will be ordered.⁶ Furthermore, in 1864 and 1878, Congress provided that the Court of Claims should hear and determine certain claims for the use of patented inventions by the United States; in these cases, if the plaintiff

⁶ *U.S. v. Dubilier Condenser Corporation*, 289 U.S. 178; *Solomons v. U.S.*, 137 U.S. 342; *Houghton v. U.S.*, 23 F. (2nd) 386.

recovered judgment against the United States and was paid, the title to the patents was to vest in the Government. This method of ensuring that the Government may acquire title to important inventions, no matter by whom invented, may be less direct than the 'mandatory alienation' of Soviet law, but it is no less effective.⁷

In addition, between 1916 and 1943, more than thirty different statutes, mostly the legislation of two World Wars, authorised agencies of the Federal Government to purchase patent applications, patents and licences. The Synthetic Fuels Act, 1944, gave wide powers to the Secretary of the Interior in the matter of acquiring patent rights,⁸ whilst, in the famous Act of 1933 setting up the Tennessee Valley Authority, it was provided that patent rights to inventions made by employees of the T.V.A. should become the sole property of the Authority.⁹

The United States Government also has exceptional powers with regard to patents in the field of atomic energy. Under the Atomic Energy Act, 1946,¹⁰ any patent previously granted on atomic energy is revoked and the patentee may demand compensation from the Government. The Atomic Energy Commission is also empowered to purchase or obtain a licence of all future patents relating to atomic energy and to designate a Patent Compensation Board, which will determine royalty fees or other compensation to be paid by the Government. Any person dissatisfied with the award may appeal to the Court of Appeals for the District of Columbia within thirty days, but the decision of this court shall be final subject to review by the Supreme Court by writ of *certiorari*. The opportunity for judicial review is in keeping with the best American constitutional principles, but otherwise there are remarkable similarities between this method of rewarding inventors by cash awards and the Soviet system. For there is a very great difference between giving an inventor a fixed cash bonus and the normal American system of giving him a piece of industrial property such as a patent, with all the hazards and costs of exploitation on the one hand, yet with the hope of vast and continuing profits on the other hand. Both systems recognise the need for 'incentives'; each reflects in its own way a different national psychology. That the United States in this matter of the development of atomic energy should have departed from its traditions of private enterprise may have been inevitable in the circumstances. But it is the source of much disquiet amongst many Americans.

It has been shown that the power of the United States Government to acquire rights to inventions is very extensive. With

⁷ See Joint Resolution of June 3, 1864 (13 Stat. 588) and Act of June 19, 1878 (20 Stat. 583).

⁸ 58 Stat. 191, 30 U.S.C. Supp. V, sec. 323.

⁹ 48 Stat. 62, 16 U.S.C. 831.

¹⁰ 60 Stat. 768, 42 U.S.C. 1811.

regard specifically to inventions by Federal employees, this power may arise from four different sources,

- (i) Common Law principles.
- (ii) Statutes.
- (iii) A contract with the Federal employee.
- (iv) Administrative regulations.

(i) *Common Law principles.*

Whereas in England inventions by Crown servants are regarded as the property of the Crown—although the Crown can and often does relinquish its rights—in the United States the mere fact that an invention was made by a Federal employee does not give to the United States any interest in the invention or in any patent resulting from it. The United States may, however, acquire an interest in the invention, just as would any private employer, because of the circumstances in which it was made.

In the important case of *Solomons v. U.S.* [1890]¹¹ the Supreme Court laid down the basic principle. A stamp had been invented and patented by the Chief of the Bureau of Engraving and Printing of the Treasury Department and had subsequently been used by the Government. Holding the United States not liable for patent infringement, the court pointed out that the official concerned had been assigned the duty of devising a revenue stamp for the bureau and had made the invention with the aid of facilities provided by the bureau. The court said, 'An employee performing all the duties assigned to him in his department of service may exercise his inventive faculties in any direction he chooses, with the assurance that whatever invention he may thus conceive and perfect is his individual property. There is no difference between the Government and any other employer in this respect. But this general rule is subject to these limitations. If one is employed to devise or perfect an instrument or a means for accomplishing a prescribed result, he cannot, after successfully accomplishing the work for which he is employed, plead title thereto as against his employer. That which he has been employed and paid to accomplish becomes, when accomplished, the property of his employer'.

Later cases elaborated this distinction between incidental brilliance in the general conduct of duty on the one hand and the position of a person 'employed to make an invention' on the other hand. In the leading case of *U.S. v. Dubilier Condenser Corporation*,¹² Dunmore and Lowell, two physicists on the staff of the National Bureau of Standards, were assigned to research on 'airplane radio' problems. As a result of their endeavours three inventions were made relating to the use of house lighting current

¹¹ 137 U.S. 342.

¹² 289 U.S. 178.

for radio reception—an entirely different, if related, field. Confronted with this situation, the Supreme Court distinguished *Solomons v. U.S.* and held that the Government was not entitled to the patents. The court said, ‘One employed to make an invention, who succeeds during his term of service in accomplishing that task is bound to assign to his employer any patent obtained On the other hand, if the employment be general, albeit it cover a field of labor and effort in the performance of which the employee conceived the invention for which he obtained a patent, the contract is not so broadly construed as to require an assignment of the patent’.

The case is not remarkable for any new standard of fundamental principle so much as for the dissenting opinion of Mr. Justice Stone, who appeared to show a deeper understanding of the principle involved than did the majority and who was also much more far-sighted. Indeed the subsequent history of United States policy in this matter has largely been a vindication of Mr. Justice Stone’s dissent. In the course of his opinion he said, ‘(Dunmore and Lowell, when they made the inventions) were not, of course, engaged to invent, in the sense in which a carpenter is employed to build a chest, but they were employed to conduct scientific investigations in a laboratory devoted principally to applied rather than to pure science with full knowledge and expectation of all concerned that their investigations might normally lead, as they did, to invention Dunmore and Lowell undoubtedly proceeded upon their own initiative beyond the specific problems upon which they were authorised and directed to work by their superiors in the Bureau, who did not actively supervise their work in its inventive stages. But the evidence leaves no doubt that in all they did they were following the established practice of the section. For members of the research staff were expected and encouraged to follow their own scientific impulses in pursuing their researches and discoveries to the point of useful application, whether they involved invention or not and even though they did not relate to the immediate problem in hand’. Showing a greater understanding of the process of invention than the majority, he went on to say that he thought the test adopted by the majority was too mechanical. His view was that where the employer’s rights to the invention are not fixed ‘by express contract, and no agreement may fairly be implied, equity determines after the event what they shall be’, and that where an invention is contemplated, as here, the patent, which is ‘the fruit of the very work which the employee is hired to do and for which he is paid, should no more be withheld from the employer, in equity and good conscience, than the product of any other service which the employee engages to render’.

Mr. Justice Stone made the further significant observation that ‘Government service creates equities in the employer which are absent from private employment The inventors were not only

employed to engage in work which unmistakably required them to exercise their inventive genius as occasion arose; they were a part of a public enterprise. It was devoted to the improvement of the art of radio communication for the benefit of the people of the United States, carried on in a Government laboratory, maintained by public funds. Considerations which might favour the employee where the interest of the employer is only in private gain are therefore of slight significance; the policy dominating research in the Bureau, as the inventors knew, was that of the Government to further the interests of the public by advancing the radio art. For the work to be successful, the Government must be free to use the results for the benefit of the public in the most effective way. A patent monopoly in individual employees, carrying with it the power to suppress the invention, or at least to exclude others from using it, would destroy this freedom; a shop right in the Government would not confer it. For these employees, in these circumstances, to attempt to withhold from the public and from the Government the full benefit of the inventions which it has paid them to produce, appears to me so unconscionable and inequitable as to demand the interposition of a court exercising chancery powers'.¹³

(ii) *Statutes.*

We have already seen that in 1864 and 1878 Congress provided for payment to be made by the United States to inventors who established their rights in the Court of Claims.¹⁴ But these measures related to specific instances only. An Act of 1910, however, gave patentees a general right to sue the United States in the Court of Claims for 'reasonable and entire compensation' for the use by the Government of a patented invention without licence or lawful right 'provided further that the benefits of this Act shall not inure to any patentee, who, when he makes such claim is in the employment or service of the Government of the United States; or the assignee of such patentee; nor shall this Act apply to any device discovered or invented by such employee during the time of his employment or service'.¹⁵ This Act constitutes a serious discrimination against Federal employees and is due, apparently, to the belief that, as Federal employees were assisted in making their

¹³ Mr. Justice Stone's reference to a 'shop right' necessitates some explanation of this right conferred by the Common Law. A 'shop right' is a non-exclusive, irrevocable, non-transferable, royalty-free licence to the employer by the employee. The employer thus becomes entitled to use in his own business an invention made through facilities provided by him. As the Supreme Court said in *U.S. v. Dubilier Condenser Corporation*, 'The United States is entitled, in the same way and to the same extent as a private employer, to shop rights, that is the free and non-exclusive use of a patent which results from effort of its employee in his working hours and with material belonging to the Government'.

¹⁴ See p. 434 above.

¹⁵ 36 Stat. 851, c. 423.

inventions at Government expense, they should not be able too easily to assert their rights against the Government. It should be noted, however, that the Act still leaves the Federal employee in a stronger position than the British civil servant. The British civil servant has no legally enforceable 'right' to his invention; but the United States Federal employee is not by this Act deprived of his 'right' to his invention. It is merely that he cannot enforce his rights against the Government; he can still enforce them against others.

(iii) *Contract.*

The United States, like any private employer, may make a contract with its employees requiring the assignment of all rights to inventions.

(iv) *Administrative regulations.*

Just as the United States may make contracts with its employees depriving them of patent rights to inventions made in the course of employment, so it may impose similar conditions on its employees by administrative regulation. For a long time it was left to the various Government agencies to decide their own policy in this respect. Thus the Department of Agriculture, the Department of the Interior (which has extensive responsibilities concerning the development of synthetic fuels) and the Bureau of Standards required assignment of title to all inventions made in the course of employment, although they might at their discretion waive their rights or content themselves with a royalty-free licence. On the other hand the War and Navy Departments applied a policy along the lines of the majority decision in *U.S. v. Dubilier Condenser Corporation*. Allowing for the natural conservatism of Service departments, the real reason for the difference was that, whereas Service departments employ scientists for specific military purposes and are not interested in what they invent outside their set tasks, civil departments conduct research of a more general nature and of a greater commercial value. Also the Service departments affected to believe that their employees, if they could not keep their patents, would lack incentives. The weakness of this argument was illustrated by the fact that the employees of these very departments were required to assign title to inventions in the fields where they were employed to invent, fields in which one would imagine the need for incentives to be greatest. Also, the Signal Corps, which followed a policy opposed to that of the War Department as a whole, produced during World War II more inventions than any other branch of that department.¹⁶ The Signal Corps felt that to allow individuals to take out patents would make them reluctant to

¹⁶ See The Investigation of Government Patent Practices and Policies, Report and Recommendations of the Attorney-General to the President, Vol 2, p. 436.

exchange their ideas with each other and, above all, would discourage commercial firms from coming forward with their own ideas. Thus, the Signal Corps reported, 'We needed the closest possible liaison between our own and the commercial laboratories, and we found the commercial outfits reluctant to disclose their newest ideas to men who might use those ideas as springboards towards improvements, on which improvements the contractor might later be asked to pay royalties'.¹⁷

Nothing could illustrate better than this statement the inappropriateness, under modern conditions, of the patent as a stimulus to invention. Indeed conditions have so changed that, as hinted in the above report, a patent may be a positive hindrance. For, whereas the prospect of a patent, with its monopoly of exploitation for a limited number of years, may be the ideal incentive for a lone-wolf inventor, it is too crude and haphazard a means of rewarding group research—and virtually all modern research is group research. Considerations of this sort were instrumental some time ago in persuading many American universities, with the University of Chicago in the van, to forbid its employees to take out patents on inventions.

Also, under modern conditions, the inventor, whether or not he is a member of a research group, nearly always is an employee either of the Government or of a commercial firm or of a university and works in a laboratory built and equipped by his employer. So in any case it is not for him that the patent is an incentive, but for his employer.

Moved no doubt by these considerations, by the desire to secure uniformity of policy as between the various Federal agencies and by the same underlying sentiments as those to which Mr. Justice Stone gave expression in his dissenting opinion in *U.S. v. Dubilier Condenser Corporation*, President Truman issued a directive on January 25, 1950.¹⁸ In this it was provided that 'The Government shall obtain the entire right, title and interest in and to all inventions made by any Government employee

- (i) During working hours, or
- (ii) With a contribution by the Government of facilities, equipment, materials, funds, or information, or of time or services of other Government employees on official duty, or
- (iii) Which bear a direct relation to or are made in consequence of the official duties of the inventor'.

In appropriate cases the Federal agency concerned—and all agencies were to apply the new policy—might content itself with a royalty-free licence, whilst in yet other cases the inventor could still be left with all rights in his invention.

On any view of the matter this Presidential directive constitutes

¹⁷ *Ibid.* p. 435.

¹⁸ Executive Order 10096. Federal Register, Vol. 15, No. 16.

a significant step, since it amounts apparently to a rejection by the United States of the patent as the major incentive to invention among a very large number of potential inventors. By the President's supporters of course the reform is welcomed as one long overdue and one which will lead not only to greater uniformity between Federal agencies but also to greater harmony inside them. To his extreme opponents, on the other hand, the President's order sounds as the death-knell of private enterprise. To those who argue that the pre-eminence of the United States in industrial production is largely—some protagonists even say solely—due to the beneficent American patent system, it is as if bungling New Deal midwives had strangled at birth the Edisons and Bells of the future. Answering such objections on an earlier occasion the Commissioner of Patents himself said, 'The argument has often been made that unless employees of a bureau . . . are entitled to retain some part of the rights to inventions produced by them while in Government service, employees of necessary competency cannot be procured at the salaries the Government is ready to pay. I am not persuaded that this is true'.¹⁹

It remains to be seen how this new directive will work out in practice because, despite the emphasis on uniformity, there are still loop-holes by which the departments may continue to justify their separate policies. Even so the importance of the President's order as a declaration of policy cannot be gainsaid.

BRITISH PRACTICE

This is not the place in which to outline the British patent system in general. For that readers are referred to the Patents and Designs Act of 1949.²⁰ But it is useful and interesting at this stage to examine briefly British policy in the matter of encouraging inventions by Government employees.

To those circles in the United States who regard Britain as semi-Communist and the Truman Administration as only one degree less Socialist than the British Labour Party, it will come as no surprise that, in this field, as in so many others, Britain occupies a position intermediate between that of the Soviet Union and of the United States. Despite the nationalisation of many industries Britain still retains the basic essentials of the patent system. Doubtless the typically British compromise whereby a nationalised industry is a public corporation, yet operating on a commercial basis, has much to do with this compromise. For, in law, the employee of a nationalised industry, except of course in the case of the Post Office, is not a Crown servant.

Nevertheless this legal distinction cannot alter the basic fact

¹⁹ Evidence of the Commissioner of Patents, Hearings of Kilgore Committee p. 701, note 82.

²⁰ 12 & 13 Geo. 6, c. 62.

that the industrial structure of the country has been radically changed and that this change may in time necessitate a reform of the patent system far more fundamental than the largely technical reforms effected in the recent Act. In time it would seem as if the policies applied to Crown servants as such—and their number, too, is growing as the Government interests itself more deeply in scientific research—must provide a model for the nationalised industries and perhaps even for all industry. Here it is noteworthy that the policy now announced by President Truman is similar to the policy for a long time followed by the British Government, but recently found inappropriate. Inventions by Crown servants have traditionally been regarded as the property of the Crown. The Crown has, however, as a matter of practice, been accustomed to pay a reward in suitable cases in respect of Crown user of the invention. Where the Crown has not been interested in the subject-matter of the invention, the inventor has been allowed to exploit the commercial rights, subject as a rule to a royalty-free licence in favour of the Crown. Authority has been given to the various departments to make awards up to £1,000, but Treasury sanction has been required for larger amounts. Through its control over finance the Treasury has been able to impart a fair degree of uniformity into the system. Exceptional problems arising out of the two World Wars have led to the setting up of the Royal Commissions on Awards to Inventors.

Experience has shown that, while such a policy is satisfactory when the majority of inventions relate to military use only, it is no longer adequate when Crown servants are engaged, as they are today, in research which is likely to produce discoveries of great commercial value. For it still leaves open the possibility that Crown servants will become entitled to valuable rights in inventions that have been made under Government auspices and at Government expense. It is not surprising therefore that this policy has been largely modified. According to the new policy Crown servants are not as a rule allowed to take out patents in any invention made at Government expense or relating to a field in which the Government is interested. Such inventions are now rewarded by an extended system of cash awards. These awards are given, not only in respect of Crown user as previously, but also in respect of proceeds accruing to the Crown from the commercial exploitation of the invention. Also the award depends to a large extent on the status of the Crown servant concerned. Those Crown servants who are allotted to specific tasks and who produce inventions wholly within the field of their task are said to be 'status-barred' and are not entitled to any award save in the rare case of 'exceptional brilliancy'. Those, on the other hand, whose inventions lie entirely outside any allotted task, may expect a maximum award. In between these two extremes awards are

varied in proportion to the degree in which the inventor is 'status-barred'. Although many other factors were involved, considerations of this sort largely explain why Sir Frank Whittle was awarded £100,000 for his inventions in connection with jet propulsion, whereas Sir Donald Bailey was given only £12,000—both awards were tax-free—for his invention of the 'Bailey Bridge'. For Sir Frank Whittle at the time of his early inventions was only a cadet in the R.A.F. and not holding any technical post, whilst Sir Donald Bailey was on the staff of the War Office Experimental Bridging Establishment itself. The Royal Commission on Awards to Inventors referred to this fact, saying 'In determining the quantum of the award, the Commission felt that regard must be had to the general civil service background. Many civil servants had played an onerous and distinguished part in the prosecution of the war without thought or expectation of a pecuniary award'.²¹ The interest in this comparison lies not so much in the difference in the amount of the two awards, for which in the circumstances there was every justification, as in the reasoning which lay behind the Commission's decision.

This decision of the Royal Commission should not be interpreted as involving any discrimination against Crown servants. The results of such a policy, especially at a time when the Government is playing an increasingly prominent part in scientific research, would soon be disastrous. Rather, in this and in other sections of its report, the Royal Commission is explaining the official British attitude to this question, and there is no reason to suppose that this attitude is not in accordance with public opinion. That is to say, each case should be decided on its merits; awards should not be distributed according to any rigid formula; every circumstance should be taken into account and, whilst awards may be large in cases of 'exceptional brilliancy'—as for instance in the example of Sir Frank Whittle—they should be modest in cases where a Crown servant has merely fulfilled his duty in his own particular field. It is strongly felt that to reward those who are 'employed to invent' too liberally would be inequitable as regards the majority of Crown servants, who no doubt are equally conscientious but who have the misfortune to work in a field where there is very little possibility of coming forward with an invention. Also it cannot be disputed that public opinion would not countenance a system whereby large tax-free awards were distributed too liberally, apart at least from cases of 'exceptional brilliancy'.

To sum up, British policy, whilst departing even further from the traditional patent system than has the American, has nevertheless not advanced very far in the direction of the competitive Stakhanovite system.

²¹ See First Report of Royal Commission on Awards to Inventors, Cmd. 7586.

CONCLUSION

It is now time to draw some conclusions from a survey which has necessarily been somewhat diverse. The main conclusions are :

- (i) That the patent law of a country, and indeed its whole policy with regard to the encouragement of inventions, is but a reflection of the general social philosophy of that country. The modification of the harsh equalitarianism of the Soviet Union by its no less stern Stakhanovite system; the growing tendency towards equalitarianism in Britain; the weakening hold of private enterprise in the United States; all these trends are noticeably apparent in the policies adopted by these countries with regard to inventions by Government employees.
- (ii) That large-scale changes in the industrial structure of a country are bound to lead to changes in its policy relating to patents and inventions generally. It may be doubted whether the full implications in this respect of the development of atomic energy in the United States by a Federal agency and of the nationalisation of industries in Britain have as yet been realised.
- (iii) That, once the patent system is discredited and outmoded, the need for an alternative yet remains. At present everything points to the cash award as the natural alternative in all three countries. The cash award, however, may prove no less contentious than the patent. Apart from the objection that the invention was financed at Government expense, the policy of the cash award still does not meet the difficulty that modern research is nearly always organised on a group basis. It may be that the collective reward to a whole laboratory, already provided for under the Soviet law, will prove the answer to this problem.

If then the solution to the problem of encouraging inventions by Government employees lies in the cash award, suitably adjusted to compensate in the right proportion both individual brilliance and collective team-work, the lawyer must realise that what used to be a branch of the law of industrial *property* has become part of the law of industrial *relations*. But, under whatever heading it is studied, it is submitted that this subject needs greater publicity and greater attention from lawyers and legal writers in England than it has received in the past.

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' COURTS ON TRIAL ' *

You never can tell till the case is decided,
Which way the decision will go;
The best fighting plea that was ever provided
May melt like a handful of snow.
With findings in fact, and findings in law,
With precedents old, and distinctions to draw,
Oh! you never can tell till the case is decided,
Which way the decision will go.

—*More Law Lyrics* by Robert Bird (Edinburgh, 1898).

So sings the litigant, but his voice has not always penetrated into the study of the jurist. Our contemplative jurisprudence was, however, troubled when twenty years ago Judge Frank published his *Law and the Modern Mind*, the first English edition of which was reviewed in the last issue of the *Modern Law Review*. Now this distinguished and formidable disturber of the peace has launched another major attack.

The argument of *Law and the Modern Mind* was directed against the traditional view of law as a system of settled and certain rules from which it is possible to deduce by logical operations 'the law' applicable to any given set of facts. Few of us now hold that view with the old conviction. In the rapidly changing world of today we have perforce come, even the professors, to a greater or less degree of 'rule-scepticism'; we admit that at least sometimes a case does not clearly fall under a pre-established rule, that the court may have to decide whether or not to extend a rule to cover a new case or to choose which of two possible rules to apply, and that in these circumstances the court cannot reach its decision by pure legal logic. But Judge Frank goes further. He writes, sometimes, as if he had no use for legal rules at all. At any rate, he argues in the present work that it is senseless to speak of legal rules creating legal rights, that my legal rights are unknown until they have been tested and vindicated by the decision of a court in a specific case and the decision is (practically speaking) something unpredictable. To the present writer this argument seems to go either too far or not far enough. If we follow Judge Frank's line of thought, what is the point of saying that a right exists even when a court has given a decision? Suppose the court decides in my favour, my opponent may continue the fight in the Court of Appeal. Suppose every court up to the Supreme Court of Appeal decides in my favour, is my right now secure? What if my

* *Courts on Trial. Myth and Reality in American Justice.* By JEROME FRANK. Princeton University Press (London: Geoffrey Cumberlege). 1949. xii and 441 pp. 40s. net.

opponent starts all over again by bringing a fresh action? The orthodox lawyer has an answer to hand; my opponent will fail because of the rule of *res judicata*. But Judge Frank can scarcely appeal to a rule. All he can say is that, if my opponent tries to bring another action *ex eadem causa*, there is a possibility, one can make the more or less doubtful prophecy, that the court will utter the magic words *res judicata* and throw my opponent out of court. But there is also the possibility that the court may be bribed, bullied, bamboozled or hypnotised into neglecting even so well-settled a rule as that of *res judicata*. Or, going back to the original action, there is the possibility that the court officers and police may go on strike, so that I cannot obtain enforcement of the order in my favour. Or, coming to a more common situation in the world of today, that my opponent may remove himself and his property out of the jurisdiction, or may have no property to meet my claim. The court order in my favour will then give me but an empty satisfaction. Why should Judge Frank pick on it as the all-important point, the distinctive moment of the legal process, the essential constitutive element of the so-called 'legal right'? It is merely one step in a process which may or may not eventually result in a change in my factual circumstances.

We may agree with Judge Frank that for most lawyers law is rather an art than a science, and that in the practice of their art they are engaged not in an exercise of pure deductive logic but in a calculation of probabilities and possibilities into which many factors must enter; we may agree that the apparent certainty of legal rules is often illusory. We may surely agree that it is important to find out what happens to actual parties in a particular case. But this is not the whole truth about law. Legal rules do not exist solely as factors for the calculation whereby the lawyer tries to predict the outcome of the particular case. If I am assaulted and robbed by unidentifiable men in the streets of London, I may never obtain redress and, so far as concerns myself on this occasion, it is just as if I had experienced a similar adventure while travelling in a barbarous country which knows no law forbidding such conduct towards the stranger. But for the inhabitants of London generally, and even for myself when going about the London streets on other occasions, it is (one hopes) not meaningless to say that there is a rule of English law forbidding assault and robbery, and a police force whose duty it is to enforce that rule, and that this makes a significant difference between England and that other barbarous country. The existence of a rule and the knowledge that courts and police will seek, according to their best lights, to apply it in action constitute a social fact with psychological consequences in public thought and behaviour. Nor is the existence of a relevant legal rule without effect on the conduct of the judge; even if he is determined to evade it, he will not

be able to behave in the same way as if he had an openly acknowledged discretion.

In *Courts on Trial*, however, the acute observation, the healthy scepticism and the polemic vigour of the distinguished author are mainly turned upon that part of the judicial machinery by which the courts establish the 'facts' to which they would apply their 'rules'. Is there not, he asks, as much uncertainty and unpredictability about the facts that a court will find as about the law that it will declare to be applicable to them? 'For court purposes', we must remember, 'what the court thinks about the facts is all that matters.' Can we be even reasonably sure that what the court thinks about the facts corresponds to the truth about them as known, presumably, to the Recording Angel? Witnesses, even if honest, may be biased or mistaken. (The present writer has heard of two judges who, happening to witness a motor accident, proceeded, immediately, to examine each other on what they had seen and heard, only to find great discrepancies between their recollections, and his own recent experience includes a visit to a trial court where less highly trained but apparently equally honest and disinterested witnesses were contradicting one another not only over the speed of a moving vehicle but on the point whether a stationary vehicle had been standing directly opposite or some yards to the east or some yards to the west of a particular gateway. Any practitioner could doubtless add dozens or hundreds of similar instances from his own knowledge.) Moreover, Judge Frank bids us remember that trial judges and juries are themselves witnesses of what goes on in the court room and they may be inattentive or biased or mistaken in their estimate of the credibility of those who testify before them. Between the facts as they happened and the court's vision of them there are thus interposed at least two screens (more, when hearsay is admitted) and each screen introduces a possibility of distortion. 'Facts are Guesses' is the title of one of the chapters in the present work. For the Appellate Court, and the textbook writer, it may be well enough to say that the law is based on the facts as found by the trial court, but this is no help to the trial lawyer anxiously considering whether the evidence will convince the court of the truth of the facts as stated by his client, and it is worse than no consolation to the party who has lost his case because he has been unable to convince the court of what in his own mind he knows to be true. His lack of means may have made it impossible for him to dig up all the evidence that might have helped him, the witnesses he has been able to secure may have been unconvincing in their demeanour in the box, or his clumsy honesty may have proved ineffectual against his opponent's glib perjury. The law may be based on the facts as found, but that is not to say that the trial court is a good instrument for finding the true facts.

This is a point to which Judge Frank returns again and again.

Judges being human, there is an element of subjectivity in all their judgments, as much in their estimate of the credibility of a witness as in their application of a rule of law—a judge may have ‘plus or minus reactions to blonde women or bearded men or Italians or Englishmen’; and when a judge attempts to achieve objectivity he is all too apt to base his estimate of witnesses on unreliable home-made criteria, such as that a witness must always be lying if he shifts his gaze or bites his lip. As for juries, even if they are composed of intelligent and experienced men of the world, they are not necessarily competent to decide facts as presented by the unfamiliar technique of the court-room. Moreover, juries, even more than judges, are swayed by prejudices, *teste* the work on practical advocacy (cited at p. 121) which recommends that you demand a jury if you represent a plaintiff who is a ‘woman, child, an old man or an old woman, or an ignorant, illiterate or foreign-born person unable to read or write or speak English who would naturally excite the jury’s sympathies’, especially if the defendant is a large corporation, a prominent or wealthy person, an insurance company, railroad or bank. Balzac defined a jury as ‘twelve men chosen to decide who has the better lawyer’. As for lawyers, all men who frequent courts know the tricks by which a trial lawyer seeks to involve honest adverse witnesses in self-contradictions and otherwise to weaken their testimony and to enhance the plausibility of the testimony on his own side. At p. 52 Judge Frank goes so far as to say, ‘The very precision of a rule may be a guide for the unscrupulous lawyer: It tells him just how to coach witnesses. It furnishes a perjury chart’. In short (p. 62), ‘One’s rights to life, liberty or property are subject to the effect of such variable factors as crooked lawyers, crooked witnesses, mistaken witnesses, absence or death of witnesses, loss of documents, competence of lawyers, mistaken judges, biased judges, inattentive judges, stupid judges, crooked judges, inattentive juries, biased juries’.

At times Judge Frank may be thought to overstate his case. He occasionally (e.g. on p. 17: ‘A witness is not a photographic plate’) speaks as if he thought that the problem of subjective uncertainty in the ascertaining of facts were peculiar to the court-room, whereas it is an elementary point in epistemology. Every science dealing with ‘facts’ partakes of this uncertainty in some degree inasmuch as it depends at some point on observations made through the human senses, which are rough instruments of observation, and on human attention, which is liable to fail. Even when instruments can measure to the millionth of an inch the recordings of these instruments have to be read by the human eye and momentary inattention may admit error in the process of noting or copying them as a basis for calculation. Even when the calculations are mechanically performed the answers have to be apprehended by means of the senses. Nor is such mechanical aid available to all. How does a doctor ascertain the ‘facts’ on

which he bases his diagnosis? Partly, if he is fortunate, from data furnished by radiographic, microscopic or chemical examinations (but even these need to be interpreted), partly from his own direct observation of the patient, but largely from the stories of witnesses, namely, the patient's attendants and the patient himself, who may be the worst witness of all. Yet doctors succeed in curing many of their patients and the law courts in reaching many conclusions which are not complained of as mistaken in fact, and basing thereon judgments which are accepted as just.

All the same, even if Judge Frank overstates his case, he has a case. A court, unlike the experimental scientist or even the doctor, must rely almost entirely on the testimony of witnesses—and Judge Frank has much reason to compare court fact-finding with the historian's conjectural reconstruction of past events. That being so, it is important to consider what improvements in technique can be made. Judge Frank offers a number of suggestions (pp. 422-423), not all of which will be accepted without question by the lawyers. He suggests that the Government should accept more responsibility for seeing that all practically available evidence of importance is introduced at a trial of a civil suit; the end seems desirable, but it may be a question whether the best means is to give the court a general power of investigation on its own initiative or rather by a system of legal aid to ensure that no litigant be debarred by ignorance or poverty from seeking out and presenting his evidence for himself. He suggests that juries should be abandoned except in major criminal cases. "Jury-made law" is, par excellence, capricious and arbitrary, yielding the maximum in the way of lack of uniformity, of unknowability If only a jury trial is properly conducted according to the procedural rules, the jurors' decision may be as arbitrary as they please If anywhere we have a "government of men", in the worst sense of that phrase, it is in the operation of the jury system.' If such wholesale abandonment of the jury is thought too revolutionary, he suggests that there should at least be more use of informed special juries, that some of the present strict exclusionary rules of evidence might be dropped, and that the function of the jury should be limited to returning a 'special', that is, a purely fact-finding, verdict; no doubt the 'general verdict' which they are commonly asked to return ought to be the outcome of a jury-room deliberation in which the members have first scrupulously estimated the facts and then faithfully and logically applied to them the principles of law expounded by the judge, but can we believe that it always is so in practice? A jury can go far in disregarding the judicial instruction before it reaches the point at which its verdict is in danger of being upset for perverseness, and the stories which occasionally leak out from the jury-room suggest that such disregard is not rare, whether it come from mental confusion or prejudice or a perhaps in some respects laudable desire to prefer

substantial justice over strict law, as in the case of the jurors who said, 'We made up our minds to disregard the evidence on both sides and decide the case on its merits'. (From this side of the Atlantic we may offer Judge Frank the story of the wretched man who, having killed his mistress and then, half out of his mind, attempted to commit suicide, was found guilty of murder, because, as the foreman later explained, although the jury were not convinced that the killing was intentional, 'we thought it was better in the interests of all concerned, including the prisoner himself, that he should just be hanged'.)

Judge Frank himself would doubtless elevate substantial justice above strict and formal law, but he holds it important that those who are trying to do justice should know clearly what they are doing and should undergo some preliminary preparation to purge them of self-delusion and prejudice. He suggests that not only should citizens be trained for jury service but that there should be special education for future prosecutors and for future trial judges, 'such education to include intensive psychological self-exploration by each prospective trial judge'. He suggests that judicial robes should be discarded and that in other respects court proceedings should be made less formal; some people may, however, think that, at any rate in criminal matters, an element of judicial solemnity is desirable, and it may be that his elevated seat and formal costume are of assistance to the judge himself in maintaining his sense of detachment and judicial impartiality.

As for procedure on appeal, the suggestion that a talking movie of every trial (to be shown before the Appeal Court in the event of an appeal) 'would completely reproduce the manner in which the witnesses testified' seems to rest on the erroneous assumption that the camera cannot lie, but (at least to an outside observer) there seems to be something in the suggestion that the trial judge should sit, though without vote, along with the Appeal Court which reviews his judgment.

The general purport of these and other reforms which Judge Frank suggests is plainly to strengthen the hand of the judge, to encourage the 'individualisation' of law suits by trial judges (properly trained) and to let such individualising power be not surreptitiously but openly exercised. Our present attempts to do justice, he argues, are hampered by our clinging to the belief that rules and procedures have an efficacy and a virtue in themselves, a belief in which the anthropologist would see the survival of a primitive faith in magic and the psychologist the persistence of a childish attitude to life. Let us, or at least our judges, put away childish things and face problems like responsible adults.

This sounds desirable. Is it attainable? Even Judge Frank admits in the end that rules are to some extent necessary. Rules and procedures are a sort of legal machinery, but we must not regard them as automatic machines producing results independent

of human guidance, and still less must we make a God of the machine.

But let us return to that part of the machine which is supposed to perform the task of fact-finding. Why is it so apt to go wrong? Because, Judge Frank would say, it is constructed on a fundamentally wrong principle. Most, if not all, of the particular faults which he has detected are traceable, in his opinion, to one underlying cause, namely, the contentious nature of our judicial process. A law suit is a substitute for the armed combat by which ruder men once settled their disputes, and it is still in substance and in form a fight, a fight in which each side strives, with the aid of any trick and stratagem that is allowed to it, to obtain victory in the shape of a court order entitling the person in whose favour it has been issued to call on the organised force of the community to support him in the enforcement of his claim. Neither party is therefore concerned to bring out 'the whole truth' but only, at best, so much of the truth as will support his case, and for the lawyers, or hired champions, it is as important to weaken the effect of the adversary's blows as to deliver their own. The court itself is not concerned to elicit the truth but merely as an umpire to see that the parties deliver their blows according to, or not noticeably in violation of, the rules. This is not a proper technique for finding facts at all. Facts would be much more easily, fully, truthfully and perhaps cheaply found if investigations were made by court officials, if judges took a much more active part in examining witnesses, if the examination of witnesses were made freer and more informal, if 'lie-detectors' were circumspectly used—if, in a word, our contentious procedure, both civil and criminal, were at least in part reconstructed as what Judge Frank would call an 'investigatory' and we more commonly call an inquisitorial procedure.

All this we may admit, but few things in this world are wholly good, and if the contentious method has its defects, the inquisitorial method has its attendant dangers. From saying that it is the duty of all the lawyers concerned in a particular case to co-operate to the same end, the discovery of the truth, is it, we may ask, such a far descent to saying that they should all co-operate to establish some pre-arranged conclusion, that a trial should be (like many of the 'experiments' conducted by the school science master) a rigged-up 'demonstration' of what is believed on other grounds (such as, in a criminal trial, the preliminary police investigation) to be true, and, finally, that it should be a demonstration of what a ruler thinks it politically expedient that his subjects should believe to be true—a procedure in which 'there is no division of duty between judge, prosecutor and defence counsel' and counsel publicly urges his client to admit his crimes and apologises to the court for defending him (see the reports of the *Kostov* trial in Bulgaria in December, 1949)? Even if it is a far descent, the slope

is steep and, if precautions are not taken, easily descended. One good and useful brake is a sentiment of respect for the dignity and privacy of the individual. Although it may sometimes be necessary, it is always degrading for a man to have his whole life and character dragged out and turned over and sniffed at and pawed about in court and recorded in the newspapers for his public shame and perhaps in the secret police files for his future peril. Let only so much of his life be exposed as is necessary to ascertain and cure a specific alleged wrong. The surgeon does not turn every operation into a general exploratory operation, but that is what is apt to happen when an official investigator is given a general roving commission.

The 'fight-theory' which Judge Frank dislikes, whatever may be its historical explanation, does at least recognise this. A man is entitled to his privacy. His opponent, whether public prosecutor or civil plaintiff, alleging that wrong has been done, has a right to lay bare his actions so far as is relevant, but, in as much as it is not yet certain that wrong has been done, the defendant has a right to defend himself and in some measure to counter-attack. The court meanwhile shall see that neither transgresses the proper limits or uses weapons which are unfair. Of course injustice may sometimes result. Each fighting party is naturally under a temptation to sneak an advantage by breaking the rules, and the court may be, if not corrupt, at least occasionally unobservant. Some football matches may have been won because the referee was bribed or because he honestly failed to notice a foul. But surely not all. And, incidentally, it helps to secure observance of the rules that the game should be played in public under the eyes of knowledgeable spectators. Our courts do their work in public and their decisions, even if not open to newspaper criticism, are likely to be remembered and discussed by the legal profession as well as by the parties interested.

We would not claim all the virtues for the process of contention (which would be foolish) or deny the unquestionable merits of the process of inquisition (which would be even more foolish) or accuse Judge Frank (which would be untrue) of advocating the immediate and wholesale adoption of the latter with eyes blinded to its possible consequences. But he has so vigorously and emphatically condemned the former that it seemed necessary (in the true spirit of contention) to inquire what could be said in its favour and (in the spirit of prudence) to urge that before unfamiliar methods are adopted inquiry should be made into their dangers as well as their attractions. We should like to know how far the procedure of other countries really follows inquisitorial lines. Schönke's *Einführung in die Rechtswissenschaft* (1947), for instance, describes modern German criminal procedure as neither purely contentious nor purely inquisitorial and refers also to French law as combining both principles. Before we agree with Judge

Frank that the institution of the King's Proctor is 'a step in the right direction', we should like to hear the opinion of experienced English divorce practitioners on the question, together with that of the German lawyers on the working of the provisions which give their courts inquisitorial powers in certain questions of marriage and personal status. We should like to hear what the foreign lawyers thought of the whole idea of inquisitorial procedure in civil as well as in criminal matters. And, above all, we should like the lawyers of countries which have experienced totalitarian rule to tell us what they have found to be the strengths and weaknesses of their court systems when subjected to governmental and party pressure. It is right to examine ourselves for faults, but it is both undue humility and bad logic to assume that those who do not share our faults are therefore without any faults of their own.

A secondary topic, but one which a teacher of law may be pardoned for taking up, is furnished by Judge Frank's views on legal education. Here again he has much right on his side but seems occasionally (may one say, through his love of contention?) to exceed in his denial of all right to the other side. He is surely right in condemning the 'neurotic escapism' which led Langdell into believing, and preaching, that law is a pure science whose laboratory is the library, that teachers need have neither past experience of nor present contact with legal practice and that students need not see either the inside of a law office or of a court. Langdell invented the 'case-method', but this misnamed method consists in the study of printed records, usually of upper-court opinions, and such an opinion is, in Judge Frank's words, 'not a case, but a small fraction of a case, its tail-end. The law students are like future horticulturists studying solely cut flowers; or like future architects studying merely pictures of buildings. They resemble prospective dog-breeders who never see anything but stuffed dogs' . . . 'What would we say of a medical school where students were taught surgery solely from the printed page?' But, in rejoinder, we may ask: What would we say of a medical school where students were led straight into the operating theatre to learn by watching the surgeon at work, before they had themselves ever dissected a cadaver or even studied the diagrams in a textbook of anatomy? English law, before and for too long after Blackstone, knew such a state of things, of which some melancholy experiences are recorded in the twelfth volume of Holdsworth's *History*. Judge Frank, however, once he has demolished the extreme claims of his adversary, does not advance such extreme claims on his own side and we can accept without qualms his suggestions that a considerable proportion (not necessary all) of the teachers in any law school should have had practical experience, that, if the case-method is to be retained, it would be better to use fewer and more fully recorded cases, and that students should regularly, and professors

at least occasionally, visit the courts. The advantages of the suggestion that students should, under guidance, assist in the actual work of legal clinics as medical students do in the work of medical clinics would seem to be already enjoyed by those of our students who combine their attendance at a law school with an office apprenticeship. The British teacher will probably feel that Judge Frank's list of non-legal subjects which the law student should learn is, like similar lists given by other American writers, so extensive that he, for his part, and his students could not cover it save in superficial and quite inadequate fashion, but this question of 'background studies' is one on which the law teachers of one country can hardly criticise or advise those of another—so much depends on the curriculum and standards of the general education which the student has received from his earliest days, long before he approached the portals of the specialised law school.

There are many other facets to this book, perhaps too many. Some of the chapters read like essays or lectures separately composed and later thrown together. Not enough has been done to work them into a pattern or, generally, to ensure that the author's lively thought should be presented in the most elegant and economical form. There are shifts of angle, there is loose writing and much repetition. An irritating feature is the number of citations without exact reference; we do not all know our Aristotle well enough to trace a sentence from the slender clue that it comes from the *Nicomachean Ethics* (sometimes we are not given even so much of a clue as this), and there are many interesting citations from less familiar authors which we should have been glad to follow up, if they had not been presented in the same unhelpful way. The complaint most probably to be expected from readers, however, is of over-emphasis, one-sidedness and exaggeration, more in the presentation of the arguments than in the conclusions reached; but a vehement and provocative delivery may be necessary to the preacher who wants to stir the slumbers of the orthodox and set them questioning the articles of their creed. What Judge Frank has given us is, in short, a book to think about, to argue over, to quarrel with, to reply to, but certainly not a book to neglect.

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Amphitrite better founded than is always admitted but of narrower application than the case suggests at first sight

LIMITATIONS ON THE CONTRACTUAL LIABILITY OF PUBLIC AUTHORITIES

(Continued from p. 339.)

II

In the first part of this article it was suggested that the rule in *The Amphitrite* was better founded than is always admitted but was of narrower application than that case suggests at first sight. There remains another possible explanation of *The Amphitrite*, namely, that a person to whom a discretion has been entrusted cannot bind himself as to the manner of exercising that discretion in the future.⁹⁶ Thus broadly stated, the principle would without further limitation effectively prevent any authority from ever entering into a binding long-term arrangement since inevitably the authority must have at least a discretion whether or not to act, and any agreement except in so far as it deals with immediate requirements must necessarily trench upon that discretion.⁹⁷ It is, of course, possible that this supposed principle is nothing more than that already discussed cast in a different form, namely, that any governmental authority must always retain the power to act for its own preservation despite any agreement which it has made. Such has not, however, at first sight been the construction given by the authorities. Here the authorities are numerous⁹⁸ and in the main concern discretionary powers conferred by statute. The principle was described by Lord Birkenhead in *Birkdale District Electricity Supply Co. v. Southport Corporation*⁹⁹ as a well-established principle of law. In that case he set it out in the following words 'if a person or public body is entrusted by the legislature with certain powers and duties expressly or implicitly for public purposes, then those persons or bodies cannot divest themselves of those powers and duties. They cannot enter into any contract or take any action incompatible with the due exercise of their powers or the discharge

⁹⁶ See Keir & Lawson, 3rd ed., p. 315.

⁹⁷ The principle if rigidly applied would have denied validity to the contract even as between the original parties in *Smith v. River Douglas Catchment Board* ([1949] 2 All E.R. 179) since the discretionary nature of the powers of a Catchment Board had been emphasised and had formed the foundation of the reasoning of the majority of the House of Lords in *Kent v. East Suffolk Catchment Board*, or see *Chessington Development Co. v. Surbiton B. C.* [1948] Ch. 369.

⁹⁸ See, for example, *Ayr Harbour Trustees v. Oswald* (1879) 11 Ch.D. 661; *York Corporation v. Henry Leatham & Sons* [1924] 1 Ch. 557 and the cases there discussed.

⁹⁹ [1926] A.C. at p. 364.

of their duties'. It is moreover a principle which although mainly applied to statutory duties does not seem to be necessarily limited to these. Thus, in *MacAlister v. The Bishop of Rochester*,¹ although a question of the effect of the statute (14 & 15 Vict. c. 97) was also involved, the judgment of Lindley J. (as he then was) at p. 206 does not seem to be necessarily limited to that question, where, holding that the conduct of the vicar could not amount to an estoppel preventing the assertion of a right of presenting to a chapel, he said: 'A vicar's rights are not mere private rights which can be renounced at his own will and pleasure, they are accompanied by important spiritual and other duties in the performance of which all his parishioners are interested'.² It was this public element which appeared to be critical in his view. In the *Birkdale Case* the supply company had authority to 'make such charges for the supply of electricity as may be agreed', subject to maxima and restrictions against undue preference; they had made an agreement tying their charges to those made by Southport, an agreement which they then alleged was ultra vires on the grounds that it interfered with the exercise of their statutory power to fix charges. This argument was rejected both in the Court of Appeal and House of Lords, both holding that the agreement was not incompatible with the public duties of the supply company. The judgments are of interest in showing an inclination to confine the principle stated by Lord Birkenhead within reasonable bounds, the difficulties of too wide an application were emphasised by Sargant L.J.,³ and it seems that, at any rate, in the view of Lord Sumner, the incompatibility if it was to vitiate the contract must amount to a 'renunciation of a part of their statutory birthright', or be contrary to the fundamental objects of the corporation. Certainly the case does not justify a proposition that in no circumstances where a discretion is given can an agreement for future conduct be made, and one limitation of the principle seems to be inherent in the emphasis placed in their decisions on 'public' duties, an emphasis which alone would exclude the rule from many suggested applications.⁴ The absurdity of too wide an application is perhaps best shown by an earlier case, *Stourcliffe Estates Co., Ltd. v. Bournemouth Corporation*,⁵ in which the corporation acquired lands for a public park under powers granted by section 164 of the Public Health Act, 1875, and covenanted not to erect any buildings thereon other than a summer

¹ (1880) 5 C.P.D. 194.

² See also Grove J. at p. 203 where he emphasises that the claim is in a 'public matter'. And see *The Queen v. The Governors of Darlington School*, 6 Q.B. 682 for an application of the principle in respect of a chartered corporation.

³ [1925] 1 Ch., at p. 824.

⁴ See, for example, *Sunderland Corporation v. Priestman* [1927] 2 Ch. 107, per Tomlin J. at p. 116. The agreement there was, he said, entered into in a private capacity and the effect contended for by the defendant would have effectively prevented the corporation carrying out its public obligation as a highway authority and therefore could not be allowed.

⁵ [1910] 2 Ch. 12.

house, bandstand or shelter. In breach of this covenant the corporation proposed to erect public lavatories on a part of the land adjacent to that of the plaintiff company (the original vendor), and claimed that the covenant was ultra vires since by a private Act of 1892, they were entitled to erect lavatories, a power which was abrogated by the agreement if the latter stood. The Court of Appeal had little difficulty in dismissing this contention (founded upon the same authorities as those discussed in the *Birkdale* and *York Cases*) since the power was merely subsidiary and not one of the primary purposes envisaged in the authorisation of the acquisition. It was, as Buckley L.J. pointed out, by no means necessary that the corporation should be capable of exercising this particular power in respect of each piece of land which it acquired.

In effect, these cases do not so much involve a proposition that a discretion cannot be fettered but are rather concerned with the ultra vires doctrine that a body entrusted with special powers for public purposes should not be allowed to disable itself from exercising these powers since so to do is to deny the object for which that body was created. Thus expressed it by no means follows that in any case where a discretion is conferred no agreement can limit the future exercise of that discretion; that consequence will only follow where the discretion involves a power fundamental to the purposes and existence of the authority in question. Any other conclusion would, of course, present insuperable difficulties to the new public Boards. Inevitably their powers must be given in general terms thus involving a discretion whether or not those powers shall be exercised. Thus, for example, section 2 (2) of the New Towns Act, 1946, gives to each corporation a general power to carry out building or other operations, or to carry on any business in or for the purposes of the new town, and section 1 (2) (a) of the Coal Industry Nationalisation Act, 1946, includes among the functions of the National Coal Board any activities which can advantageously be carried on by them with a view to making the best use of their assets, yet it would seem absurd that neither should be capable of entering into valid restrictive covenants in respect of land, or that in the latter case a change of opinion as to what was the best use of their assets should entitle the Board to disregard with impunity a covenant entered into previously.⁶ Yet in both these cases there would be some fetter upon the powers and discretions of the authorities concerned which would, it is submitted, nevertheless be binding on what is believed to be the effect of the *Birkdale Case*. As such, it is suggested that the principle contained in these cases has, in relation to subsidiary public bodies, the same effect as the principle expressed in *The Amphitrite* (as interpreted above) has in relation to the central government, and that these subsidiary bodies have,

⁶ As to the time of determining the invalidity or otherwise of the agreement see the *Birkdale Case* (*supra*).

though only within fairly narrow limits, the same absolute freedom of action enjoyed by the Crown. Hence one aspect of the question whether or not the public bodies are extensions of the Crown and thus enjoy the same privileges loses significance. If they are they gain no greater liberty of action in this regard, and if they are not they lose none.⁷

In view of the discussion above of the position of Crown servants it is perhaps worth while to treat specifically the application of this principle of supposed impossibility of fettering a discretion to the servant of the Crown and of other subsidiary authorities. Attention has already been drawn to the clauses authorising employment of subordinate officials in ministries established by statute. At its widest this doctrine would reinforce the rule of dismissability in such cases as *Smyth v. Latham*,⁸ since any appointment for a fixed term or regulation by contract of the mode of dismissal must automatically cut down the Minister's power to regulate the numbers of his staff as he thinks fit. This discretionary power seems inherent in such sections as those quoted above (note 71, *ante*). But for the reasons just given above it is submitted that the invalidity of all time contracts need not follow, and the wording of the common form section does not appear by itself to exclude the possibility of appointments for a fixed term. Such sections do confer a discretion but it is one unconnected with the essential powers of the Minister. As to the public boards the statutes creating them include no direct provision on this aspect of the employment of servants.⁹ Hence it is thought that the ordinary rules of master and servant apply, subject, however, to the limited powers of dismissal which it has been suggested are in truth conferred by the cases already discussed. The basis of the power whether grounded on public policy or on a like principle to that suggested in *The Amphitrite*, is equally applicable to the public bodies, though since the functions of these boards are less fundamental than those of other governmental bodies there can be little scope for the application of the power in connection with them. For the same reasons, the question whether or not the servants of the Boards are servants of the Crown ceases in this connection to have significance though clearly of radical importance if the reasoning based upon the suggested narrower interpretation of *Dunn v. The Queen* is incorrect. As to the members of the Boards themselves the position varies. In some cases provision is made for tenure to be fixed by contract by reference to the instrument of appointment,¹⁰ and so any

⁷ As to the question see Friedmann 10 M.L.R. and *Tamlin v. Hannaford* [1949] 2 All E.R. 327, denying that the Transport Commission does enjoy the privileges of the Crown.

⁸ *Supra*, 9 Bing. 690.

⁹ Such clauses as s. 20 of the Air Corporations Act, 1949, directing the public boards to pursue the policies of model employers seem quite inconsistent with the existence of any arbitrary powers of dismissal.

¹⁰ See First Schedule, Air Corporations Act, 1949; First Schedule, New Towns Act, 1946; First Schedule, Agriculture Act, 1947; Agricultural Land Commission.

absolute discretionary power of removal may be either excluded or inserted. In other cases¹¹ the terms of tenure are to be fixed by regulation, and hence, even when employment for a fixed term is authorised by existing regulations, the agreement itself must be subject to any alteration of the regulations.¹² In a few cases¹³ a statutory provision for a fixed term applies, but is, of course, again subject to alteration by statute.

In regard to local authorities the position has been discussed in two cases. In the first, *Brown v. Dagenham U. D. C.*,¹⁴ the plaintiff had been appointed an assistant overseer under section 5 (1) of the Local Government Act, 1894, and clerk of the council under section 189 of the Public Health Act, 1875. The latter section expressly stated that every officer should be removable at pleasure, the former gave to the rural parish the power of appointing and revoking the appointment of the assistant overseer. McCardie J., after a lengthy consideration of the authorities (including the line of cases leading up to the *Birkdale Case*), concluded that, in view of section 189, an agreement providing for three months' notice was ineffective. On this point the case adds little to the general problem, and the *Birkdale* decision seems hardly to have been relevant; the case involved not so much limitation of discretion as simply an appointment the terms of which were ultra vires. The council as a statutory creation was empowered by the statute creating it only to make a certain type of service agreement, namely, an appointment at pleasure, and hence, any other type providing for notice was clearly ultra vires. On section 5 (1) of the Act of 1894, where there were no words 'at pleasure', again the learned judge construed the section in the same way, attaching great importance to the word 'revoke' as involving necessarily a breach of an existing agreement. In reaching that conclusion he was clearly greatly impressed by the effect of the other section, and by the cases relating to Crown servants, but having reached that conclusion on interpretation again the case could have no great interest from a general point of view, since it was resolved solely into a question of statutory powers. In the second case, *McManus v. Bowes*,¹⁵ the plaintiff was appointed as an assistant medical officer under section 276 of the Lunacy Act, 1890, which, by subsection (3), authorised the committee having the power of appointment, to remove anyone appointed under that section. The majority of the Court of Appeal (Slessor and Mackinnon L.JJ.) held that the natural meaning of the word 'remove' was 'to remove at pleasure', and that,

¹¹ Section 2 (7), Coal Industry and Nationalisation Act, 1946; Third Schedule, National Health Service Act, 1946; s. 5 (11), Cotton (Centralised Buying) Act, 1947; s. 2 (5), Town and Country Planning Act, 1947.

¹² Compare *Reilly v. The King*, *supra*, a similar situation.

¹³ Ninth Schedule, Agriculture Act, 1946, Agricultural Land Tribunal; Second Schedule, Bank of England Act, 1946.

¹⁴ [1929] 1 K.B. 737.

¹⁵ [1938] 1 K.B. 113.

accordingly, the plaintiff had no right to any notice of dismissal. The immediate harm of these cases is remedied by section 121 of the Local Government Act 1933, under which an agreement for notice may be made even with officers whose employment is by law to be at pleasure, and hence the employment of local government officers is to be dealt with simply on the basis of such contract. They do, however, illustrate a tendency in the interpretation of statutes which is conditioned by the air of unenforceability which surrounds the employment of Crown servants, but in view of altered conditions it is thought that a more liberal interpretation, from the point of view of the employed, might well be placed upon such clauses in the future. A full meaning can be given to words such as 'revoke' or 'remove' without implying these wide discretionary powers.

The cases are, however, sometimes treated as being concerned with the limitation of discretion, and to that extent would be in conflict with the principles suggested above as defining the scope of operation of this doctrine, but as has already been suggested, if the cases are carefully analysed, it is apparent that this doctrine was not involved. The contracts in question were bad as being ultra vires on other and more simple grounds, namely, that their terms were not justified by the statute under which they were expressly authorised. This point is really made in two other cases which are at first sight to the same effect. In the first, *Nixon v. Att.-Gen.*,¹⁶ an action was brought by an established civil servant in respect of his pension, alleging that he had entered the service on the basis of a Treasury Minute setting out scales of superannuation allowances. This he claimed had thereby become part of his contract of service and thus enforceable as a right. The pension had in fact been calculated on a different scale. The grant of such pensions has, since 1834, been governed by section 30 of the Superannuation Act of that year,¹⁷ making all pensions purely discretionary, and Lord Dunedin, in dismissing the claim based upon the supposed contract, said (at p. 193): 'If you find that the statute gives the Lords of the Treasury a discretion that is their power and their only power, and they cannot possibly by a contract take themselves out of it, they might by contract possibly involve themselves in permanent liability, but they never could involve the Crown because they are not authorised to make any such contract'. In the second, a Scottish case, *Riach v. Lord Advocate*,¹⁸ the action was brought by an informer to recover a reward allegedly promised to him under

¹⁶ [1931] A.C. 184.

¹⁷ 4 & 5 Will. 4, c. 24, s. 30: 'Provided always and be it further enacted that nothing in this Act shall extend or be construed to extend to give any person an absolute right to compensation for past services or to any superannuation or retiring allowance or to deprive the Commissioners of H.M. Treasury or the head or principal officer of the respective departments of their power and authority to dismiss any person from the Civil service without compensation'.

¹⁸ [1932] S.C. 138.

section 32 of the Inland Revenue Regulation Act, 1890,¹⁹ for giving information of income tax evasion. He had in fact been paid a reward but claimed a much greater sum under a supposed agreement for a percentage of the amounts ultimately recovered by the Revenue authorities. The claim failed, and it is arguable that it did so on the grounds that such an agreement, even if proved, would be bad as a fetter on the discretion given by the section to the Commissioners of Inland Revenue,²⁰ but it seems that the principal point made both in the court of first instance and in the Court of Session was that the section did not authorise that particular contract, and hence, any agreement to the effect contended was bad as involving an expenditure of public money without statutory power. The Lord Ordinary, Lord Fleming, said that the effect of the section was simply to authorise payment of a reward but gave no authority to enter into a binding agreement to pay one in the future, an agreement which, in his opinion, being contrary to public policy would require explicit sanction which could not be found in the Act. Similarly, in the Court of Session, Lord Sands was of opinion that the section only authorised the payment of a reward for a fait accompli, and gave no power to enter into a preliminary agreement, with which Lord Blackburn agreed. The dissentient members of the Court of Session based their judgments upon a different construction of the Act.

It is therefore thought that there is no authority for any general proposition that any agreement fettering a discretion is bad; but that the authorities show that, provided a power is given to enter into the contract in question, it will not be invalidated by the fact that it will in the future hamper a public authority in exercising its discretionary powers, unless the effect is to prevent the authority carrying out some fundamental public purpose for which it has been created. Accordingly, this supposed principle cannot affect either contracts of employment under the Crown or under other public authorities, nor can it create any effective limitation upon the Crown's contractual capacity beyond that which is already imposed by what is conceived to be the true basis of the decision in *The Amphitrite*, since in that sphere it amounts to no more than an alternative expression of the same principle, and is subject to the same narrowness of application.

There remains one further limitation of the contractual powers of the Crown which is commonly supposed to be based upon *Churchward v. The Crown*,²¹ namely, that the Crown cannot by contract become liable for the payment of money without parliamentary

¹⁹ 'The Commissioners may at their discretion reward any person who informs them of any offence against any Act relating to inland revenue or assist in the recovery of any fine or penalty provided that a reward exceeding £50 shall not be paid in any case without the consent of the Treasury'.

²⁰ See Keir & Lawson, *Cases on Constitutional Law*, 3rd ed., p. 315.

²¹ (1865) L.R. 1 Q.B. 173.

sanction. This is a doubt which was raised as far back as 1786 in *Macbeath v. Haldimand*²² by Lord Mansfield, though he regarded the point as unnecessary for the decision of the case before him. It is undoubtedly true, as he said in that case, that whoever advances money for the public service trusts to the faith of Parliament in the sense that all transactions of the Government are ultimately dependent upon the grant of supply and appropriation since, in the absence of such a grant, any remedy will have no practical value. That is, however, by no means the same thing as the assertion that parliamentary approval direct or indirect is an implied term in all contracts entered into with the Government, and that their validity depends upon such authorisation. The importance of this distinction seems to be enhanced by the Crown Proceedings Act, 1947, since if the contract is valid in its inception, and is subsequently broken by the Crown as a result of a failure to obtain funds, an action for breach will lie, and on the assumption made above, section 25 (3) of the Crown Proceedings Act (which seems somewhat wider than its predecessor in the Petition of Right Act) seems to create an obligation on and give authority to the appropriate department to satisfy the resulting judgment.

The case generally treated as authority for the proposition that parliamentary approval is a condition precedent to the validity of the contract is *Churchward v. The Queen*,²¹ and particularly the judgment of Shee J., but that this is probably a misconstruction of the case, and especially of the judgment of Cockburn C.J., was pointed out by Evatt J. in *N.S.W. v. Bardolph*.²³ In any event there seems in *Churchward's Case* to have been an express term to that effect.²⁴ That, at least, is the basis upon which the judgments proceeded, being based upon the phrase in the contract that the subsidy of £18,000 a year was to be paid out of moneys to be provided by Parliament,²⁵ this subsidy Parliament deliberately chose not to grant. Even apart from this the court held that the petition failed on the ground that there was no obligation on the Crown to employ the petitioner, which was perhaps the primary reason for the rejection of the petition.²⁶ Cockburn C.J. was, however, at pains to point out (at p. 200) that he was very far from saying that 'if by express terms, the Lords of the Admiralty had engaged, whether Parliament found the funds or not, to employ Mr. Churchward to perform all these services, that then, whatever might be the inconvenience that might arise, such a contract would not have been

²² I.T.R. 172 at p. 176.

²³ (1935) 52 C.L.R. 455.

²⁴ And see Dr. G. L. Williams, *Crown Proceedings*, at p. 10. For the present position of such a contract see O. 71 of the Standing Orders of the House of Commons making a similar term still requisite.

²⁵ See Cockburn C.J. at p. 200, Mellor J. at p. 203 and particularly Shee J. at p. 209 and Lush J. at p. 212.

²⁶ These reasons seem to be separate and not interdependent as suggested by Lord Haldane in *Att.-Gen. v. Great Southern Ry. of Ireland*, *post*, p. 773.

binding . . . ' and that ' . . . in such a case a petition of right would not lie '. A statement which is in glaring contradiction to the proposition for which the case is generally quoted. In view of this denial by Cockburn C.J. of the general proposition and of the special facts of the case, it can be little authority for that proposition.

In two further cases where the principle is widely stated, and which are frequently cited in support of it, the same objection holds, namely, that the statements can only be obiter and, moreover, it appears that these cases too have been misconstrued. In *Commercial Cable Co. v. Government of Newfoundland*,²⁷ by virtue of the rules of the House of Assembly the contract in question required approval by that House. These rules were binding upon the Governor-General and those entering into contract with him in his public capacity were presumed to do so subject to those rules (see p. 617). The case can, therefore, by reason of its local peculiarities, be no authority for any general proposition on the relationship of the financial powers of the Legislature to the contractual abilities of the Government. In the second case *MacKay v. Att.-Gen. for British Columbia*,²⁸ the statute under which the contract was made (the Public Works Act, 1911, of British Columbia) required, in terms, either approval by order or resolution of the Lieutenant-Governor in Council, of any agreement for the acquisition of land under the Act. No such order or resolution had been made, and the case for the petitioner was vitiated by the lack of this essential which was required by the statute, and no general power was in question. Nevertheless, Lord Haldane, delivering the judgment of the Privy Council, declared at p. 461 : ' A contract which involves the provision of funds by Parliament requires, if it is to possess validity, that Parliament should have authorised it directly, or under the provision of statute '. This was a proposition much wider than any which was required for the decision of the case before the court, and it seems that judgment was not intended to carry the construction usually placed upon it as supporting the general understanding of *Churchward's Case*. That that is so appears from the argument before the Privy Council in *Kidman v. The Commonwealth*,²⁹ where Lord Haldane referring to *Commercial Cable Co.'s Case*, said : ' In that case we distinctly laid it down that he, the Governor-General as representing the Crown, could enter into contracts as much as he liked, but he was presumed only to bind the funds which might or might not be appropriated by Parliament to answer the contract, and if they were not, that did not make the contract null and ultra vires, it made it not enforceable because there was no res against which to enforce it ', and, referring to the *Great Southern Ry. of Ireland*

²⁷ [1916] 2 A.C. 610.

²⁸ [1922] 1 A.C. 457.

²⁹ (1926) *Argus Law Reports* at p. 2. Referred to by Dixon J. in *N.S.W. v. Bardolph* at p. 515.

Case (infra), said : ' the question of supply was one only affecting payment and not the validity of the contract '.

The next case relied on in this context, *Auckland Harbour Board v. The King*,³⁰ is not in truth one of contract at all, but is concerned solely with the recovery of money paid out of the consolidated fund. The payment was wrongful since the condition precedent to the payment which was laid down by the statute authorising it had not been observed. Nevertheless this, and the former cases, were relied on in *Att.-Gen. v. Great Southern and Western Ry. of Ireland*,³¹ where Lord Haldane asserted (at p. 772) : ' All grants of public money either direct or prospective must be in the discretion of the legislative, and where the system is that of responsible government there is no contract unless that discretion has been exercised in some sufficient manner '. These words appear to be an unequivocal acceptance of *Churchward's Case*, but they are modified by a later passage where, at p. 773, he said : ' It is equally clear that since the Settlement its (the Crown's) ordinary contracts only mean that it will pay out of funds which Parliament may or may not provide ' ; a statement which is inconsistent with the wider interpretation of the former passage in that it admits the possibility of a contract valid in itself, independent of parliamentary sanction, even though adequate means of redress may be lacking if it is broken. But the question of supply and appropriation does not, as he said in *Kidman's Case (supra)* go to the validity of the contract. This is by no means the general doctrine of *Churchward's Case* and is, indeed, no more than necessarily follows from the constitutional arrangements relating to government expenditure. The actual case arose out of the transfer of liabilities on the establishment of the Irish Free State, and is on proper analysis no different from the position in *Reilly v. The King*, since here Parliament had, by the Irish Free State (Agreement) Act, 1922, and the Orders made under it, transferred to the Irish Government the liabilities formerly vested in the Ministry of Transport, including those under an agreement with the petitioning railway company. The critical point of the case was this subsequent transfer of liability by parliamentary action, and not the validity of the contract at its inception.

All these cases are decisions of the Privy Council, and the special facts of each make them slight authorities for general principles, but it is apparent from the intervention by Lord Haldane in the argument in *Kidman's Case* already cited, that it was not his intention to lay down a general rule that parliamentary sanction was necessary for the validity of a contract involving the expenditure of public money, a proposition which *Churchward's Case*, although generally relied on here, does not in truth support. The fallacy of the general rule was exposed in *New South Wales v. Bardolph*,³² in

³⁰ [1924] A.C. 318.

³¹ [1925] A.C. 754.

³² (1935) 52 C.L.R. 455.

which indeed Evatt J., in a very full judgment, used these same authorities to deny that general proposition,³³ though taking exception to the dicta in the *Auckland Case* which, if carried to their logical conclusion, would hopelessly enmesh Parliament in administrative details as, indeed, would the general proposition itself. Reid J., on appeal in the same case, further emphasised at p. 496 that the Crown had a power independent of statute to make contracts which were incidental to the ordinary and well-recognised functions of government. The judgments in this case all emphasise that the validity of the contract is unaffected by parliamentary sanction though the latter may effect remedies.³⁴ That this is the true position was emphasised by *R. v. Fisher*,³⁵ a Canadian case strangely neglected in this connection since there an employee of the Crown was allowed to sue for his salary even though a specific appropriation in the Appropriation Act to his salary was insufficient.

The supposed rule must, therefore, it is thought, be rejected as opposed to authority and not merely as unsupported by it. Indeed, its practical inconveniences make such a result essential if Parliament is not to assume the entire burden of administration. There has also been advanced a somewhat similar argument in some of the 'Crown Servant' cases, namely, that in the case of the Army at least, its existence from year to year prevents any contract of an engagement for a longer term, and that in the case of other servants the same effect results from the annual financial legislation.³⁶ It is, however, apparent that with the Armed Forces long engagements are anticipated, and, indeed provided for, by statute,³⁷ at any rate for other ranks, and all the regulations governing the forces do in fact contemplate and are frequently designed to include long service in all cases. The argument however seems to involve a denial of the general rule of dismissability at pleasure apparently advanced and accepted in the same cases, since it would admit an authority to provide for fixed tenure and for periods of notice of dismissal within that year allowed by current legislation. It would thus, for example, have allowed the claim of the petitioner in *Hales v. The King*³⁸ (*ante*), whose claim was limited to a short period of notice. It is furthermore an argument which suffers from the same defects as that already discussed founded upon parliamentary authorisation of all contracts, the reasons for the rejection of which have already been given. It seems therefore that the failure to pass the Annual Army

³³ See p. 472, 'The fact of no appropriation does not strip the contract of validity', and, see Starke J. at p. 502, 'The existence of a contract is not conditional upon Parliamentary authority or upon the provision of funds by Parliament for the performance of the contract'.

³⁴ See Harry Street, 'The Provision of funds in satisfaction of Government liabilities', 1949 *Toronto Law Journal*, vol. 8, p. 32, for a further discussion of these cases.

³⁵ [1903] A.C. 158.

³⁶ See *Leaman v. The King* [1926] 3 K.B. 663; *Re Tuffnell* (1876) 3 Ch.D. 164.

³⁷ See *e.g.*, s. 76 of the Army Act.

³⁸ (1918) 34 T.L.R. 589.

Act or to provide for the maintenance and pay of the civil staffs by appropriate legislation would merely result in a supervening illegality or impossibility in the former case, and a breach of contract in the latter were civil servants dismissed in consequence. The original validity of such contracts of service would not be affected. Whether or not the impossibility should properly be regarded as self induced seems doubtful in view of the theoretical independence of Parliament from the Executive, though it might be so regarded where the absence of such legislation was due to a failure to submit proposals to Parliament rather than to a rejection by Parliament of proposals properly submitted.

In the result it is suggested that the proposition that servants of the Crown are necessarily dismissable at pleasure although apparently supported by authority is one which can be denied effect in the future. The authorities seem to show that in part this doctrine is based upon a public policy which has ceased to be applicable and which has in any event been too widely expressed so that the rule founded upon the policy extends beyond the bounds where that policy could be operative. On the other hand the authorities suggest that the rule is derived from a more general principle covering not merely contracts of service. This is the principle that the state, or probably any public authority, cannot be prevented by an existing contract from performing functions essential to its existence and for which it was created. It is this doctrine, it is suggested, which underlies the decision in *The Amphitrite* and accordingly narrows the application of that case, within reasonable bounds, and it is a doctrine which the authorities seem to suggest is applicable to other public bodies performing governmental functions. The other supposed limitations are not, it is thought, borne out by authority. The alleged inability to fetter the exercise of a discretion amounts on examination either to nothing more than the application of the doctrine of *ultra vires* based upon statutory interpretation, or in other cases to no more than to an alternative expression of the suggested *Amphitrite* principle, in a different context. The dependence of the validity of Crown contracts on parliamentary approval is not supported by the authorities usually quoted for it, authorities which seem rather to deny it on their proper construction. The effect of legislation or the grant or denial of supply or appropriation seem to be only matters touching at most the continuance of a valid contract and not its initial validity unless of course they are made by its terms express conditions precedent.

The effect of the denial of supplies may therefore be to cause a breach of contract unless the statutory intervention takes the form of a transfer of liability as in the *Great Southern Railway of Ireland Case* where the original contracting department is absolved from liability by what is in effect a compulsory assignment of the

burden of payment or takes the form of *Reilly v. The King* where there is a simple discharge of the contract by legislation. Such cases as the latter seem in fact to be rare and in the normal cases careful provision is made for compensating any who lose, for example, office or salary as a result of statutory changes.³⁹ In neither of these latter cases (*i.e.*, compulsory transfer or direct discharge) can, it is thought, any right of action arise, whereas in the first it is possible that such a right does arise on the reasoning of Cockburn C.J. in *Churchward's Case*, supplemented by section 25 (3) of the Crown Proceedings Act, 1947, which gives practical value to the right of action, and it is submitted authorises the payment of damages.

The problem remains however of the compensation of persons as for example the petitioners in *The Amphitrite* suffering as a result of the exercise of the inherent power which has been admitted. The question of compensation in such cases does not seem to have been generally discussed, and once the power to terminate the contract has been admitted or upheld it has been assumed that it has power to break without compensation, a conclusion which need not necessarily follow.⁴⁰ It would of course follow if the effect of the power were to impose a contractual disability on the Crown so that the contract apparently made was not a valid one, though even then there would seem to be a liability to pay for benefits received on the principles of *Craven Ellis v. Canons Ltd.*⁴¹ But it is submitted that such is not the true position. The contract affected is in itself valid and capable of lasting for its natural term subject to this overriding power to terminate it, a power which it seems must prevent the contract being made the subject of a decree of specific performance, but need not prevent the award of damages. It is true that it was suggested in the *Birkdale Case*⁴² that the time for determining the validity of the contract is at the moment of making it, and that that validity could not be effected one way or the other by subsequent events. Such is no doubt the position so far as the contract is on the face of it ultra vires the body making it, but it does not seem to be an appropriate rule to be applied to the general exercise of the power under discussion. The circumstances justifying its exercise may well be not only beyond the control of either party but also beyond anything which could have been foreseen at the time the contract was made.

The American cases already quoted show that what is suggested to be a similar power is exercisable subject to compensation, and it is thought that this is a possible contention in this country also. There is in the first place the feeling urged by Lord Moulton in

³⁹ See, for example, s. 149 of the Local Government Act, 1948, and the SI published thereunder which are typical of such provisions.

⁴⁰ Compare *Pennsylvania Hospital v. Pennsylvania*, ante, note 83.

⁴¹ [1936] 2 K.B. 403.

⁴² [1926] A.C. 364.

Att.-Gen. v. De Keyzers Royal Hotel,⁴³ namely that 'it was equitable that the burdens borne for the good of the nation should be distributed over the whole nation and should not be allowed to fall on particular individuals', a feeling which was part of the reasoning leading him to his conclusion in that case, and which was, he was convinced, the policy of the legislature. Moreover in the case of the prerogative powers of defence which were there concerned, a case of even greater urgency than many of those here envisaged, even if a right of compensation was not admitted, yet nevertheless there seems to have been admitted in the *Case of Saltpetre*⁴⁴ some right to restoration, and a duty to reduce damage to a minimum, rights and duties which should now result in compensation by way of damages. These prerogative powers of defence seem indeed to be simply a more obvious instance of the operation of the power under discussion and the same principles should, it is thought, apply.

Moreover in an analogous case, *Southern Foundries (1926) Ltd. v. Shirlaw*,⁴⁵ a right to damages for breach of contract was admitted where a limited company had by an alteration of its articles brought about the premature determination of a contract under which the respondent held office as a managing director for a fixed period of time. In his action based upon this breach of contract it was contended that since a limited company cannot forgo the power to alter its articles it followed that any result of the exercise of this power could not give rise to an action for breach of contract since any term of the contract which conflicted with the power of alteration must be bad. Such a term was one providing for the tenure of office as managing director. The position was therefore precisely the same as that which arises in relation to contracts of the Crown when the power above discussed comes into operation. Lord Porter at p. 740 expressly rejected the contention set out and stated the general principle in the following words: 'A company cannot be precluded from altering its articles and thereby giving itself power to act upon the provisions of the altered articles, but so to act may nevertheless be a breach of contract if it is contrary to a stipulation validly made before the alteration'. It is true that this is not repeated by the other members of the House of Lords who, Lord Maugham and Lord Romer dissenting, reached a similar conclusion by other reasoning. Those members who did dissent did so on grounds not inconsistent with the principle set out above which is one in accordance with authority. This inherent and inalienable power of a company is exactly similar in nature to that

⁴³ [1920] A.C. 508.

⁴⁴ 12 Co.Rep. 12. 'And in such a case on such extremity they may dig for gravel for the making of bulwarks for this is for the public and everyone hath the benefit by it, but after the danger is over the trenches and bulwarks ought to be so removed so that the owner shall not have prejudice in his inheritance'.

⁴⁵ [1940] A.C. 701.

which, it has been suggested, is possessed by the Crown and other public bodies and it is submitted that the same conclusion should follow—that its exercise where it causes a breach of contract should give rise to a right of action for damages. This right of action does not seem to be ruled out by the authorities discussed, which, as has been pointed out, stop short at the recognition of the power without any close analysis of the effect of its operation, and it is certainly a right which is commended by reason.

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SOME ASPECTS OF THE LAW RELATING TO COMPANY CONTROL

OF all the changes in the law embodied in the Companies Act, 1948, that which has enjoyed, perhaps, the widest measure of approval is the provision which necessitates, in certain cases, the publication of group accounts. Such accounts are required where there exists the holding company—subsidiary relationship, *i.e.*, where one company controls another. For this purpose there was necessary a definition of control, or rather a statement as to the circumstances in which the law would consider such control to exist. But that provision is not the only one relating to control which is to be found in the statute book, for several have been found necessary for taxation purposes, and it is of interest to compare these with the provision of the Companies Act.

The simplest of these provisions is to be found in the Finance Act, 1940,¹ and it states that in the case of a company in which the directors have a controlling interest, in computing profits, no deduction shall be made in respect of directors' remuneration. The expression 'controlling interest' was also used in the Finance Act, 1937,² with regard to the calculation of profits to determine liability to pay National Defence Contribution. As to what shall constitute this 'controlling interest' the statutes are silent, but, as might perhaps be expected from the use of the word 'interest', the courts have brought the statutes into operation only where control is exercised through the holding of shares—though it was decided in *Commissioners of Inland Revenue v. J. Bibby & Sons*³ that such shareholding might be either beneficial or as trustee for others, since the statute referred not to any pecuniary benefit obtained from the shares, but to the power which they gave of influencing corporate decisions.⁴ This power, in the form of ability to pass resolutions, depends on the holding of a voting majority, and the courts are strict in their demand for a holding of more than 50 per cent. of the voting rights.⁵ This is illustrated by the recent case, *C.I.R. v. Monnick*,⁶ where four persons each held 500 shares in a company, only these shares having been issued.

¹ Section 33 (5).

² Schedule IV, para. 7 (b).

³ [1945] 1 All E.R. 667.

⁴ See *per* Lord Russell of Killowen at p. 669.

⁵ It was argued in *British American Tobacco Co. v. C. I. R.* [1943] A.C. 335 that the term 'controlling interest' imports control, not only of a bare majority of shares, but of such proportion of the total number as would secure the passing of a special resolution or any other resolution for which a special majority is required. This argument was, however, rejected.

⁶ Reported in *Accountant*, Aug. 6, 1949, at p. 147.

Of the four, only one was a director (though another was manager, and as such deemed to be a director for the purposes of the Finance Act), and to him the remaining director, who held no shares, had delegated his powers. The director had nevertheless failed to appoint himself chairman of the board, although as such he would have taken the chair at general meetings and had there a casting vote. The position was, therefore, that the two persons who were directors for tax purposes controlled 1,000 votes, whilst the remaining shareholders controlled 1,001. In spite of the fact that this position could at any time be reversed if the shareholding director appointed himself chairman, the court held that this was not a director-controlled company.⁷

Another interesting case, *British American Tobacco Co., Ltd. v. C.I.R.*,⁸ was a decision relating to National Defence Contribution. The appellant company held shares in eleven companies, all incorporated and carrying on business outside the United Kingdom and so not liable to pay N.D.C. In four of those companies it held more than 50 per cent. of the votes; in the remaining seven, it, together with one or more of the four, or one of the four alone, held more than 50 per cent. of the voting power. Counsel for the company urged that a 'controlling interest' in a company imports the ability to control its actions in general meeting and that such ability is only conferred by direct shareholding, but this argument was not accepted by the court.⁹ The realism of even such a common-sense decision as this was sufficient to evoke mild surprise in the explanation of the case in one of the leading text-books! But to have decided otherwise would have been to add an unnecessary limitation to that already imposed by the use of the word 'interest'.

A wider definition of control, and one without that inherent limitation, was contained in the Finance Act, 1940, in relation to the payment of estate duty. Section 55 (3) provided that a person should be deemed to have control of a company if he could control the majority of the votes, or if he could exercise the powers of the directors or appoint the directors or a majority of them. But even wider than this is the last of these provisions of the Finance Acts.¹⁰ This was designed to prevent avoidance of the payment of super-tax (now surtax), by the non-distribution of company profits, and it has been the object of several later amendments designed to stop up loopholes discovered by sagacious legal advisers. Such profits may in certain cases

⁷ A similar result was arrived at in *C. I. R. v. James Hodgkinson (Salford), Ltd.* (reported in *Accountant*, Aug. 20, 1949), where it was held that powers of attorney executed by shareholders and purporting to transfer their voting rights to directors must be ignored in deciding whether the company was director-controlled.

⁸ [1943] A.C. 335.

⁹ See, e.g., *per* Viscount Simon L.C. at p. 339.

¹⁰ F. A. 1922 s. 21, as amended by F. A. 1927 s. 31, F. A. 1936 s. 19 and F. A. 1939 s. 13 (1).

be apportioned by the Special Commissioners amongst the members to allow super-tax to be levied on them. The provision applies to any company which is under the control of not more than five persons, other than subsidiaries or companies in which the public are substantially interested. Control is deemed to be in the hands of five or fewer persons if they are able to exercise or to acquire control, direct or indirect, over the company's affairs, particularly through the control of voting power; or if they possess or can acquire the greater part of the company's issued capital; or if more than half of the company's income, were it apportioned in the manner provided for by the statute, could be apportioned amongst not more than five persons. For this purpose, persons who are relatives of one another and those who are nominees of any other person, are to be treated as a single person. The Special Commissioners have been given even wider powers in respect of investment companies,¹¹ for they may treat as a member of such companies any person who is, or is likely to be, able to secure that the company's income or assets be applied for his benefit, even though he is not a member of the company. This provision was found useful in *C.I.R. v. L.B. (Holdings) Ltd.*¹² where a certain B. held 499 shares in an investment company, his wife holding the remaining share. After he had declared himself trustee of these shares for his wife and children, it was held that B. was 'a person able to secure that income be applied for his benefit', in spite of the fact that it would be unlawful for him to do so, as constituting a breach of trust. There was here no need to consider the words 'direct or indirect', but as was commented at the time of the enactment, that expression 'seems quite clearly to visualise not only potential control by the right of shareholders ultimately to exercise their will by removing directors, but also other forms of control such as, *e.g.*, the appointment of life directors and the limitation of the number of directors in a company'.¹³ The particular words 'direct or indirect' had not formed part of the original provision, where the phrase was 'where control is by any other means whatever in the hands of those persons'. But this was the object of adverse comment in *Himley Estates and Humble Investments Ltd. v. C.I.R.*¹⁴ There a private company was formed with the object of acquiring an interest in the estate of a tenant for life under a settlement. The tenant for life held the fifty ordinary shares; fourteen other persons each held fifty preference shares, these having the same voting rights as the ordinary shares. In spite of evidence that it was the tenant for life who had the 'directing mind' of the company and that he

¹¹ Finance Act, 1939, ss. 14-15.

¹² (1946) 175 L.T. 54. Control quite independent of membership is seen in *C. I. R. v. Tring Investments Ltd.* [1939] 2 All E.R. 105, and in *Chamberlain v. C. I. R.* [1945] 2 All E.R. 351.

¹³ *Accountant*, Oct. 16, 1937, p. 441.

¹⁴ [1933] 1 K.B. 472.

could rely on the co-operation of the other shareholders, to decide that he controlled the company was too much for the court. This decision was affirmed on appeal, the Court of Appeal finding it difficult to visualise how control could, legally speaking, be in the hands of less than five persons if they did not control a majority of the votes. The phrase 'where control is by any other means in the hands of those persons' seemed rather to puzzle the members of the court. 'For myself, I cannot see how any means other than legal can give control of a company . . . be it by voting power, be it by shareholding or be it by contract contained in the articles of association or by contract outside the articles or by fiduciary relationship'.¹⁵ We shall see how this view is supported by that section of the Companies Act, 1948, which defines subsidiaries.

It must first be pointed out, however, that that definition is in fact indicative of the legal view of control, for it embodies the recommendation of the Cohen Committee, whose report had stated: 'In our view the question of control should be decisive'¹⁶ in determining subsidiary status. Section 154 of the 1948 Act provides that one company shall be deemed to be a subsidiary of another if either that other is a member of it and controls the composition of its board of directors, or holds more than half in nominal value of its equity share capital, or if the first company is a subsidiary of the other's subsidiary.¹⁷ There follows a definition of the term 'equity share capital'—this being the issued share capital excluding any part without the right to participate beyond a specific amount in a distribution of either profits or capital. It is interesting to note, as the Committee's report itself points out, that since the equity of a company is not defined in terms of voting rights, a company holding half that equity need not necessarily control half the votes. But even here there is considerable reluctance to depart from a purely formal definition of control, and the provision of the Companies Act adds little to the view of Lawrence L.J. quoted above. It is, however, recognised that this is not the whole story, for in criticising the definition in the 1929 Act, the Cohen committee drew a distinction between a company subject to a legal power of control

¹⁵ *Per* Lawrence L.J. at p. 486. Cf. the opinion of Lord Woolton, as expressed in the *Journal of the Royal Statistical Society*, Vol. CX, p. 24, where he said that the policy of a well-directed company was not determined at its annual meeting of shareholders. The trade of the country was in the main controlled by personalities: the commercial ability of people and not shareholding was the determining factor.

¹⁶ Page 70. We are informed that in the U.S.A. and in Canada, which are probably the two countries where accounting problems particularly affecting control have received the closest study, the existence of control is recognised as determining the inclusion of a company in the category of a subsidiary for accounting purposes.

¹⁷ This inclusion, for the first time, of sub-subsidiaries in the definition, may begin a process leading to the recognition of a group of companies as an entity, the recognition of what is termed in the U.S.A. 'enterprise entity', the separate legal identities of the component companies being ignored.

and one under *de facto* control for management purposes as a branch of the holding company's group.

From this comparison of various statutory provisions, we see how all questions relating to company control can be grouped under two heads, *viz.* (i) the arrangements within the company which allow a group to obtain and to exercise control,¹⁸ and (ii) the policy which results from that exercise of control. It may broadly speaking be said that there are adjectival problems and problems of substance, the latter being ultimately of greatest interest to economists.¹⁹

Dealing first with the adjectival problems, we may trace how the law has reacted to the gradual passing of the 'centre of gravity' of the company out of the hands of the many into the hands of the few. As the number of shareholders actively interested in the company's affairs has declined, there has been a corresponding concentration of power in the hands of those who retained interest. To the early common law corporations the principle of majority rule applied, and that principle was sufficiently elastic to permit a majority of those present at a meeting to take a decision, even though that majority did not constitute a majority of the corporation as a whole.²⁰ These rules were easily taken over by the joint stock company, though in certain cases they were, and are, excluded by statute.²¹

At the same time two important changes in the law must be noted. One of these gives one vote per share instead of one vote per member—the 1862 Act providing that in the absence of any regulations as to voting, every member should have one vote.²² The other change relates to the introduction of proxy voting. As early as 1862, Table A gave members the right to vote by proxy, but only in 1947 did that right become statutory. In the intervening years, the use and abuse of the right to vote in this manner had become a weapon of the greatest importance in the struggle to establish and maintain control. With the decline in interest shown by shareholders, and the consequent reduction in the

¹⁸ An illustration of one strikingly simple method of control is to be found in *Investment Trust Corp. v. Singapore Traction Co.* [1936] 1 Ch. 615, where a company had issued, in addition to 399,999 preference and ordinary shares, one £1 'management share', giving its holder a majority of votes at any meeting.

¹⁹ See an interesting paper by Prof. Sargent Florence, 'Statistical Analysis of Company Control', *Journal of Royal Statistical Society*, Vol. CX, Part I.

²⁰ See Bacon's *Abridgment*, 'Corporations', p. 269.

²¹ The Companies Act requires specific majorities for the taking of certain decisions. And the principle of majority rule may be excluded by the company's articles—see *Perrott Ltd. v. Stephenson* [1934] Ch. 171.

²² Section 52. But at the same time Art. 44 gave one vote per share only to the first ten shares of each holding. In 1908, Table A gave members one vote per share, and in 1929 a similar provision was included in the statute itself—s. 23, see now s. 134.

number of those present at meetings, the number of proxy votes grew in comparison with the number of those given personally.²³

In many companies the position is at present, therefore, that decisions in general meeting are arrived at chiefly through the exercise of the right to vote by proxy, a method which in any circumstances is not entirely satisfactory.²⁴ But at the same time as this situation was evolving, the extent of the control of a general meeting over the company's affairs was being diminished in favour of the board of directors. The articles of association of every company allocate, no doubt, specific powers to be exercised either by the board or by the company in general meeting, but there must remain a residue of powers not allocated in this way, and it is as to the exercise of these powers that the law has changed. 'It must be borne in mind that the professional view as to the control of the company in general meeting over the actions of the directors has, over a period of years, undoubtedly varied, as may be observed by a critical investigation of the statements about the law on the matter to be found in the earlier editions of well-known textbooks.'²⁵ Thus Buckley, writing in 1897, thought that the company in general meeting had power to direct and control the board,²⁶ on the authority of *Isle of Wight Railway Co. v. Tahourdin*.²⁷ And though this was a case on the Companies Clauses Act, 1845, the prevailing judicial attitude was not averse to such an interpretation of the law.²⁸ But the turn of the century brought a change. In *Automatic Self-Cleansing Filter Syndicate v. Cunningham*,²⁹ the Court of Appeal refused to compel directors to put into effect a resolution passed by a simple majority, because the articles vested the management and control of the company in the hands of the directors, subject to such regulations as might from time to time be passed in the form of extraordinary resolutions. There was no question of the application of the Companies Clauses Act, and this allowed *Isle of Wight Railway Co. v. Tahourdin* (*supra*) to be distinguished. But Collins M.R. did consider the consequences of the decision he had to make in so far as they related

²³ In *Peel v. L. & N. W. Ry.* [1907] 1 Ch. 5 the Court of Appeal decided that the circulation of stamped proxy forms, containing the names of three directors as proxies, was not *ultra vires*, and in *Wilson v. L. M. S. Ry.* [1940] Ch. 393 the sending of stamped proxy forms only to members with large holdings was approved.

²⁴ For an illustration of this unsatisfactory position, see *Economist*, Jan. 6, 1945, at p. 21.

²⁵ *Per* Lord Clauson in *Scott v. Frank Scott, Ltd.* [1943] 1 All E.R. 582, 585.

²⁶ *Company Law*, 7th ed., p. 530. It is interesting to contrast the opinion of Lord Thring, as expressed in his *Compendium on Joint-Stock Companies* in 1861. 'The ordinary members of a joint-stock company have no voice in its management, but elect directors or managers, to whom they commit the entire control of their affairs'.

²⁷ (1883) 25 Ch.D. 320.

²⁸ See, for example, *MacDougall v. Gardiner* (1875) 1 Ch.D. 13, 25; *Pender v. Lushington* (1877) 6 Ch.D. 70 and *Harben v. Phillips* (1883) 23 Ch.D. 14.

²⁹ [1906] 2 Ch. 34. See also *Quin and Axtens v. Salmon* [1909] A.C. 442.

to the problem of majority rule, and in reply to the submission that the directors are agents and therefore to be controlled rather than to control, he stated that it would not be fair to equate the principal, for the purpose of control, with the majority.³⁰ It should be noted that the relevant article in this case differed slightly from the corresponding article in Table A of the 1862 Act, which entrusted the directors with such powers as were not required to be exercised by the company in general meeting, 'subject nevertheless to any regulations of these articles, to the provisions of the foregoing Act, and to such regulations, being not inconsistent with the aforesaid regulations and provisions, as may be prescribed by the company in general meeting'.³¹ This difference permitted Neville J. to distinguish the *Automatic Case* in *Marshall's Valve Gear Co. v. Manning, Wardle & Co.*,³² where the company had adopted Table A. There X, one of the four members of the board of directors, and holder of a bare majority of the shares, commenced an action in the company's name against his colleagues, who were interested in a patent vested in a competing company. A motion to have the action struck out, as the company's name was being used without authority, was dismissed, on the ground that control was in the hands of the majority of the shareholders. 'I think that under Article 55 the majority of the shareholders in the company at a general meeting have a right to control the action of the directors, so long as they do not affect to control it in a direction contrary to any of the provisions of the articles which bind the company'.³³ The *Automatic Case* was distinguished on the ground that there the articles required a three-fourths majority, whereas Article 55 does not. More important, however, is the distinction implicit in the latter part of the quotation from Neville J.'s judgment. For in the *Automatic Case*, power to deal with the company's property, the exercise of which the case concerned, had been specifically delegated, whereas in the later case the articles did not deal specifically with the power to bring actions in the company's name.

The test at this time was, therefore, that if a power had been specifically allocated this was 'a provision of the articles binding upon the company', and the directors could not be controlled in respect of it, but as regards other matters they could be controlled by the decision of the requisite majority.³⁴ As we have seen, however, the opinion of Lord Clauson is that the law has changed. But since that opinion was expressed in a case concerning a power specifically stated to be exercisable by the directors, the only judicial authorities for the view that the law has changed are the dicta of Lord Clauson himself and certain dicta in *John Shaw Ltd.*

³⁰ At pp. 42-43.

³¹ Article 55. Later statutes have contained articles in similar terms.

³² [1909] 1 Ch. 267.

³³ At p. 274.

³⁴ See also *Thomas Logan, Ltd. v. Davies* (1911) 104 L.T. 914.

v. *Shaw*.³⁵ In view of this paucity of judicial authority, it is not surprising that the writers of textbooks should have to rely on professional practice for their version of the law—nor is it surprising that the profession concerned should, in this instance, prefer custom to precedent as a source of law.

Other interesting aspects of the law relating to control are illustrated by a recent series of cases. These arose out of an arrangement whereby one Greenhalgh, on lending to a company £11,000, had allotted to him a number of 2s. shares ranking *pari passu* with the 10s. shares already issued. Similar shares were issued to the company's directors, who covenanted to vote with G. at general meetings, thereby giving him control over sufficient votes to allow him to carry an ordinary resolution.³⁶ The directors having assigned most of their shares, G. sought to have the transfers set aside on the ground that it was a breach of contract for the directors to put it out of their power to give him the support he needed to pass an ordinary resolution, or alternatively, he sought a declaration that the transferees were also bound by the covenant to support him. The Court of Appeal, in *Greenhalgh v. Mallard*,³⁷ affirmed the judgment of Uthwatt J. refusing relief on either ground. That part of the judgment relating to the first ground does not appear in the report, but on the second contention Lord Greene M.R. said that the submission that the covenant followed the shares into the purchasers' hands was unfounded, since the obligation contained in the covenant came to an end when the shares were sold. This was not, however, the end of G.'s troubles, for the company proceeded to pass a resolution sub-dividing the 10s. shares into 2s. shares with rights equal to those held by G. The effect of this was to deprive G. of any degree of control over the company. Again he sought to impeach the transaction in the courts, this time on the grounds, firstly, that it constituted a breach of an implied term in the loan agreement that the company would not interfere with his voting control, and secondly, that the resolution involved a variation of the rights attached to his shares, and that for this the consent of the court was necessary. But once again the Court of Appeal decided against G. Although it was clear, said Lord Greene, what the intention of the original agreement had been, the plaintiff had not ensured the carrying out of that intention by using one of

³⁵ *Per* Slesser L.J. at [1935] 2 K.B. 113, 143: 'If the permanent directors had power under the articles to bring the action, I do not see how the shareholders could interfere with that power, otherwise than by altering the articles'. But the case was decided on other grounds.

³⁶ In an earlier action, G. had already obtained a declaration that the directors were bound by their agreement to support him. The case is not reported, but the law seems well settled, see, for example, *Greenwell v. Porter* [1902] 1 Ch. 530.

³⁷ [1943] 2 All E.R. 234.

the various devices which exist for that purpose.³⁸ We have already seen two of the devices to which the Master of the Rolls may have been referring—the share or class of shares expressly stated to have sufficient voting power to pass any resolution,³⁹ and the taking of a covenant that voting rights shall be exercised in favour of the covenantee or in the manner desired by him⁴⁰—and another method is the issuing of preference shares without voting rights, but it must be admitted that the devices available are not so effective nor, one might say, so elegant, as those which exist in the U.S.A.⁴¹

Although we have up to this point been concerned with control gained and maintained through the exercise of voting rights, similar results can be achieved by another means, *viz.*, through the control either of the composition or of the policy of the board of directors.⁴² Indeed, with the swing of the balance of power away from the general meeting in favour of the board of directors, this form of control may in future become more important than the other. Section 154 (2) of the Companies Act, 1948, enacts, in substance, the recommendation of the Cohen Committee in this connection,⁴³ *viz.*, that power to appoint or to remove a majority of the directors should be a test of control. Now, such a power can be created by contract, by a provision in the subsidiary company's articles of association or perhaps by a combination of the two. In *British Murac Syndicate v. Alpertown Rubber Co.*⁴⁴ such a contract was

³⁸ *Greenhalgh v. Aderne Cinemas* [1946] 1 All E.R. 512, 513. The plaintiff was later unsuccessful in yet a third appeal to the C. A., this time in an action against the directors for conspiracy—*Greenhalgh v. Mallard* [1947] 2 All E.R. 255.

³⁹ See *supra*, note 18. This is by no means an isolated example—many companies have 'founders' or deferred shares with special privileges as to voting.

⁴⁰ This is, of course, what the plaintiff had tried to do in *Greenhalgh v. Mallard* (No. 1), but as we have seen, that attempt was frustrated by the transfer of the shares. The device is somewhat similar to that of nominee holding, which was discussed at some length both in the evidence given before the Cohen Committee and in the Committee's report. But the recommendation there should be compared with C. A. 1948, s. 173.

⁴¹ An excellent account of these is to be found in Berle and Means, *Public Corporations and Private Property*.

⁴² Both methods are illustrated by *Daimler Co. v. Continental Tyre and Rubber Co.* [1916] A.C. 307, which determined the enemy status of a company incorporated here, the holders of all its shares save one and all its directors being Germans resident in Germany. Though the ratio decidendi of the case is by no means clear, Lord Parker expressed it thus: since a company incorporated here is a legal entity, the character of individual shareholders cannot of itself affect the character of the company; but their character and their conduct may be material on applying the test to discover whether the company has assumed an enemy character, for that test is, 'Are the company's agents, or the persons in de facto control of its affairs, in fact adhering to, taking instructions from or acting under the control of enemies?' See also *The Polzeath* [1916] P. 241. And also Domke, 'The Control of Corporations', 3 I.L.Q. 52.

⁴³ Cohen Report, p. 72, Recommendation II (1) (a).

⁴⁴ [1915] 2 Ch. 186. But see also *Plantations Trusts, Ltd. v. Bila (Sumatra) Rubber Lands, Ltd.* (1916) 114 L.T. 676. And the decision of the House of Lords in *Southern Foundries, Ltd. v. Shirlaw* [1940] A.C. 701 will affect a power to appoint contained in the articles.

specifically enforced. The statutory provision just referred to relates only to the exercise of a power to appoint or to remove by another company, since it is concerned only with defining the holding company—subsidiary relationship, but the power may be in the hands of an individual. In such a case it will frequently be exercised by a permanent or ‘governing’ director.⁴⁵

After that examination of the mechanisms by which control may be obtained and maintained, we must now turn to consider the extent to which the law is interested in the results of control, *i.e.*, in actual decisions and in the policy of companies. We saw above that the provisions relating to control in the Finance Acts were necessary because the legal personality of the company could be used by a controlling group to avoid fiscal obligations by a decision to retain profits; similarly, the interest of Professor Florence, in the paper referred to above, was in the effect of particular types of control on policy, particularly investment policy.⁴⁶ Legal controls are imposed only where conduct of a certain type is felt to be harmful to the community or to a particular part of it. The requirement by the Companies Acts of special resolutions in certain cases constitutes, for example, an exception to the general rule relating to majorities enunciated above, an exception made in an attempt to compel the shareholders to take an active part in the company’s affairs, in order to avoid any widening of the rift between shareholding and control. The alterations of the law relating to meetings contained first in the 1947 Act had the same purpose. But as we have seen, other developments, particularly those with regard to proxy voting, have prevented this attempt from achieving its object.

But the requirement of a specific majority in certain cases is not the limit of the interest of the Companies Act in company decisions. In addition, some measure of protection is given to the shareholders’ pecuniary interests, either directly, as where any increase of a member’s liability without his consent is forbidden,⁴⁷ or indirectly, by preserving the company’s assets by prohibiting tax-free payments and loans from the company to directors and by making any payment to a director as compensation for loss of office subject to disclosure to, and approval by, the company.⁴⁸

In a rather different category is the provision⁴⁹ that a decision to transfer shares approved by the holders of not less than nine-tenths in value of those shares will bind dissentients, unless the

⁴⁵ See *Walker v. Kenns, Ltd.* [1937] 1 All E.R. 566; *Re T. N. Farrer, Ltd.* [1937] 2 All E.R. 505; and *Re Mozely, Ltd.* [1939] Ch. 717. And in *Tring Investments, Ltd. v. C. I. R.* [1939] 2 All E.R. 105 control was separated even from membership, as defined by the Companies Acts, for the permanent director merely had an option to take shares.

⁴⁶ *Loc. cit.* pp. 3-4, 17-18.

⁴⁷ C. A. 1948, s. 22.

⁴⁸ Sections 189-192.

⁴⁹ Section 209.

court makes an order to the contrary. This express provision of a right of appeal to the courts is but a particular example of a general principle. Other examples of a similar statutory right can be found,⁵⁰ but their existence has not affected certain extra-statutory grounds of appeal, the nature of which shows how strong has been the influence of Equity in shaping company law. The principal examples are, firstly, actions based on the principle that directors are treated for certain purposes as trustees, and secondly, those based on the rule that a majority will not be allowed to oppress a minority, with its corollary that majority rights must be exercised for the benefit of the company.

The first of these rules was most recently applied in *Regal (Hastings), Ltd. v. Gulliver*,⁵¹ where certain directors were compelled to refund money on the principle of *Keech v. Sandford*. But as an editorial note in the report points out, the result was not entirely satisfactory. 'No question as to the right to retain this profit could have arisen if the respondents had taken the precaution of obtaining the approval of the appellant company in general meeting, and this would have been a mere matter of form, since they doubtless controlled the voting'.⁵² For, despite early dicta to the contrary,⁵³ the directors occupy a fiduciary position in relation to the company rather than in relation to the shareholders, and it is difficult in this connection not to identify the company with the holders of the major part of the voting power. It is more difficult to obtain relief where control is exercised through such a holding, therefore, than where it is exercised through control of the board of directors.⁵⁴ Because of this, where the control has a voting majority, it will often be better for an action to be brought on the other ground mentioned above, *viz.*, on the ground of the oppression of a minority by the majority. The basis of this rule has been stated to be that whilst the right to vote is a proprietary right, with the exercise of which the courts will not interfere, it must be exercised subject to certain principles applicable wherever power is given to a majority to bind a minority; it must be exercised, not only in the manner required by law, but also bona fide for the benefit of the company as a whole.⁵⁵ Where a majority openly vote to themselves some benefit which immediately passes to them as individuals,⁵⁶ it is tolerably easy to call the rule into operation, but the

⁵⁰ *E.g.*, in s. 72.

⁵¹ [1942] 1 All E.R. 378.

⁵² At p. 379.

⁵³ See, *e.g.*, *per* Cairns L.J. in *Ferguson v. Wilson*, L.R. 2 Ch.App. 77, 90: 'We must distinguish the present case altogether from those cases where a shareholder files a bill against the company and against the directors, treating the directors as his trustees, which in point of law they are, and seeking redress against them for breach of trust'.

⁵⁴ Compare *Northwest Transportation Co. v. Beatty* (1887) 12 App.Cas. 589 with *Allen v. Hyett* (1914) 30 T.L.R. 444.

⁵⁵ See *per* Lindley M.R. in *Allen v. Gold Reefs of West Africa* [1900] 1 Ch. 656, 671.

⁵⁶ As in *Menier v. Hoopers Telegraph Works* (1874) L.R. 9 Ch.App. 350.

courts have been more loth to do so where the minority have been sacrificed for the sake of the 'company', even though it is clear that eventually the benefit can pass only to the majority.⁵⁷ Only by ignoring the separate entity of the company, as Astbury J. did in *Brown v. British Abrasive Wheel Co.*,⁵⁸ can relief be granted in such circumstances. In that case the learned judge refused to sanction an alteration of the company's articles which would have allowed a minority holding to be acquired compulsorily. 'If passed [the alteration], the majority may acquire all the shares and provide further capital. That would be for the benefit of the company as then constituted. But the proposed alteration is not for the benefit of this company'.⁵⁹ If the law begins to take an interest in problems of control as such, this dilemma will have to be faced. Parliament has gone behind the facade of the company's personality for the purpose of taxation; it may also have to do so to protect the interests of shareholders, though there is little likelihood of it doing so before the rift between shareholding and control has become much more definite than it is at present.

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⁵⁷ See *Goodfellow v. Nelson Lines, Ltd.* [1912] 2 Ch. 324 and *Shuttleworth v. Cox Bros.* [1927] 2 K.B. 9.

⁵⁸ [1919] 1 Ch. 291.

⁵⁹ At p. 296.

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STATUTES

FINANCE ACT, 1950

Some Reflections on Retrospective Legislation and Legal Language

THIS year's Finance Act contains nothing of particular novelty or interest from the point of view of pure revenue law. Nevertheless it raises two matters of general interest which have inspired considerable discussion in the lay and legal press.

The first of these is the question of retrospective (or retro-active) legislation raised by section 26 designed to strike at the practice of paying large sums to directors and managers in consideration of undertakings by them not to enter employment with other concerns. As a result of protracted litigation, it was decided in *Beak v. Robson* [1943] A.C. 352, that such sums were capital in the hands of the recipient and therefore not liable to income or sur-tax.

It can hardly be doubted that the practice of obtaining these covenants is objectionable under present conditions as liable to cause ill-feeling between workers and management, and the Chancellor had therefore given a warning that he would not hesitate to overrule, with retrospective effect, the decision in the *Robson Case* if the practice continued. Two particularly glaring examples caused him to take this action in section 26 of the new Act which renders such payments liable to surtax in the hands of the recipient. The section is retrospective for the tax year 1949-50 but widespread expressions of righteous indignation have caused it to be much qualified, and it only applies where the payment is made in respect of an undertaking entered into after the date of the Chancellor's warning.

In part the indignation was no doubt synthetic and based on political rather than on high moral principles. In this connection, however, the Opposition was not on very strong grounds for, as Dr. Farnsworth has pointed out in an interesting article in *The Solicitor*,¹ there was respectable precedent for the Government's action, Mr. Neville Chamberlain and Sir John Simon having done precisely the same in 1936-7.² What was surprising, however, was the opposition aroused among lawyers, academic and practising, which can certainly not be dismissed as based (consciously at any rate) on political prejudice.

¹ June, 1950, p. 185.

² *Hansard*, July 1, 1936, cols. 51-2. F. A. 1937, s. 14 (5). See also F. A. 1936, s. 18.

Some of the legal comments conveyed the impression that any form of retrospective legislation is fundamentally opposed to the most sacred principles of the common law. Such an argument is hypocritical. The retrospective alteration of the law, far from being opposed to the common law, is one of its most noticeable and essential features. Every time a higher court overrules a previous decision, the law is altered retrospectively with all the hardships and inconvenience which this may entail. In theory, of course, this is concealed by the polite fiction that a judge 'finds' the law and does not 'make' it, that when he overrules a previous decision he does not change the law but declares what it has always been notwithstanding the previous decision. Such casuistry may satisfy some academic lawyers but it cuts no ice with a practitioner or with his clients. If retrospective legislation is objectionable all the objections to it apply equally to judge-made law.

A single example, drawn from the field of taxation, will suffice to illustrate this point. Section 25 of the Finance Act, 1941, modified provisions for the payment of tax-free annuities contained in any document 'made' before September 3, 1939. There was an obvious uncertainty in this section so far as Wills were concerned. Was a Will executed prior to September 1939 but not coming into force, by the death of the testator, until after that date, 'made' before or after the crucial date? In *Re Waring*,³ Farwell J. decided that the date of death was decisive but three months later his decision was overruled by the C.A.⁴ which decided in favour of the date of execution. Happily the interval between the decisions in the two courts was short, and comparatively few can have acted in reliance on Farwell J.'s decision. But everyone acted on the decision of the C.A., and innumerable estates were administered on the basis that it represented the settled law, an assumption the more reasonable since the section in question was amended by section 20 of the Finance Act, 1945, without altering the point in question. Despite this, four years later the House of Lords in *Berkeley v. Berkeley*,⁵ overruled the previous decision with the result that the administration of all these estates⁶ had to be reopened and great was the public inconvenience which it caused. It would have been a bold jurist who attempted to explain to the executors and beneficiaries concerned that this was quite different from a retrospective alteration of the law. In practice, of course, it was exactly the same; if the Finance Act, 1946, had altered the law with effect from 1941 the result would have been identical.

³ [1942] Ch. 309.

⁴ [1942] Ch. 426.

⁵ [1946] A.C. 555.

⁶ But not in favour of the unfortunate annuitants who had been parties to the *Waring Case* (*Re Waring* [1948] Ch. 221).

If, therefore, *ex post facto* alterations to the law are objectionable, lawyers are the last people who can afford to be smug about it, for we are the worst offenders. The Legislature indulges in the practice seldom and circumspectly but the judges perforce do it all the time and without being able to choose between a retrospective and a non-retrospective charge. To what extent, therefore, is it in truth objectionable?

The wisest words yet said on this subject are those of Professor A. L. Goodhart in the July issue of *The Law Quarterly Review*.⁷ He points out that a clear distinction must be drawn between criminal and civil law. An *ex post facto* criminal law cannot fulfil the primary purpose of penal law for it cannot be a deterrent and can only operate by way of revenge. But the primary purpose of civil law (including taxation) is not to act as a deterrent and civil legislation can accomplish its primary purpose even although retrospective,⁸ although it may be open to criticism on other grounds. Such civil legislation should be judged in the light of two general propositions: (1) that the law, so far as is reasonably possible, should be certain and stable, and (2) that it should be general in character and not be altered in regard to particular individuals. There is therefore a strong presumption against any statutory provision which conflicts with either of these two principles. But the fixed rule which is true in the criminal law is only a presumption where civil rights are concerned and it can be displaced if there are special circumstances, for example, if the person who alleges that he relied on the existing law had strong reasons to believe that it might be altered to his possible disadvantage, or if the alteration is designed not to impose a special burden upon him but to neutralise a particular advantage he may have obtained owing to a defect in the existing law.

Few will quarrel with Professor Goodhart's propositions. But whereas he refers only to statutory provisions it is clear, for reasons already stated, that they apply equally to judge-made law, unless one is prepared to argue that nobody is entitled to rely on a judicial decision unless it is that of the House of Lords, in which case the sooner we scrap our whole system the better. And whereas the Legislature can choose whether, in the light of the propositions formulated by Professor Goodhart, its provisions should or should not be retrospective, the judges have no such choice; they must either alter it retrospectively or not at all. It is because of this, that ideally legislation is the more suitable instrument of law reform, but unhappily it is an instrument which cannot be used with sufficient frequency. If our law is to retain

⁷ 66 L.Q.R. pp. 314 *et seq.*

⁸ Hence the prohibition of *ex post facto* legislation in Art. 1, s. 9, of the U.S. Constitution has been held to apply only to penal laws not including taxation, *ibid.*

its flexibility judge-made law cannot be dispensed with and our rules of *stare decisis* need to become less rather than more rigid. Nevertheless, it is for consideration whether the courts should not be given power to limit the effect of the decisions to the future: whether, in other words, we should not drop the fiction that they always 'find' the law and admit that they sometimes legislate. If, in *Berkeley v. B.*, the House of Lords had been able to declare that their decision only affected the future and that the rule in *Re Waring* continued to apply to the past, it can hardly be doubted that justice would have been administered far more satisfactorily and that an immense amount of inconvenience would have been avoided.⁹

It is not suggested that every decision of the courts should operate only for the future. Where the existing law is uncertain there is no objection to an *ex post facto* provision, for *ex hypothesi* no one can have relied on an existing rule. But where there is a clear cut decision which is overruled by a higher court it is submitted that there is everything to be said for empowering that court to declare whether, and to what extent, the overruling shall operate retrospectively. This is what the Legislature do and there seems to be no reason why the judges should not do likewise.¹⁰ Our plea, therefore, is that consideration should be given to conferring this power upon them by a one-section statute. In the light of the Conservative benches' declared views on retrospective legislation such a statute would presumably be entirely non-controversial.

The second vexed question is that of 'legal language'. The Lord Chancellor recently invited the Law Reviews to consider statutory draftsmanship and therefore no apology is made for entering the lists on this issue. We take as our text section 43¹¹ of the Act, which is quoted in the footnote. Others are as bad, in earlier Finance Acts some have been worse, but this will do as an illustration of the murder of the King's English to which some of us are becoming accustomed.

⁹ And an actual miscarriage of justice so far as concerned the annuitants in *Re Waring*. See n. 6 above.

¹⁰ This would also have the desirable effect of encouraging flexibility. At present judges are reluctant to disturb a long-established rule even although they think it wrong. If they did not have to alter it retrospectively they would be more ready to introduce desirable developments.

¹¹ '43.—(1) Subsections (1) and (2) of section forty-three of the Finance Act, 1940, shall be amended as provided by Part I of the Seventh Schedule to this Act, and accordingly shall have effect as set out in Part II of that Schedule with the amendments made by the Eleventh Schedule to the Finance Act, 1946, and by this subsection.

(2) Where an interest limited to cease on a death (within the meaning of the said section forty-three) has been disposed of or has determined, bona fide possession and enjoyment of the property shall not be deemed for the purposes of subsection (2) of that section to be assumed immediately thereafter and thenceforward retained to the entire exclusion of a person who had the interest and of any benefit to him by contract or otherwise, if at any time thereafter he has a benefit by virtue of any operations associated with the disposition or

As regards subsection (1), it must be admitted that the draftsman has tried to be helpful, for in Part II of the Seventh Schedule he has printed subsections (1) and (2) of section 40 of the Act of 1940 as amended. The only criticism is why he could not have said more clearly what he was doing¹²; the wording of 'subsection (1) suggests that Part II of the Schedule has to be read 'with the amendments made by the Eleventh Schedule to the Finance Act, 1946, and by this subsection' whereas in fact they are already incorporated.

But when he comes to subsections (2)¹³ and (3) he just gives up trying. On the face of it, these are gibberish. To extract some meaning from them one must turn to the Finance (1909-10) Act, 1910, s. 59, and to the Finance Act, 1940, s. 59. Section 59 of the 1910 Act in turn refers to section 38 (2) (a) of the Customs and Inland Revenue Act, 1881, section 7 of the Customs and Inland Revenue Act, 1889, section 2 (1) (c) of the Finance Act, 1894, and section 11 of the Finance Act, 1900 (but the reference to the last-named is repealed by section 65 (8) of the Finance Act, 1940). Before one can even begin to try to understand these subsections it is therefore necessary to refer to seven other sections in six Acts going back to 1881. This is legislation by reference at its worst.

It may be too much to ask that a taxing statute should be readily understandable by the person taxed, but it is surely not too much to ask that his trained adviser should be enabled to explain its effect to him without having to buy and read six other statutes. And even when all the sections are before the adviser he will have his work cut out to explain what it is all about; the gibberish remains gibberish even when multiplied by seven.

The excuse that is always given for these atrocities¹⁴ is that

determination, nor while he has such a benefit shall the property be deemed to be enjoyed to the entire exclusion as aforesaid for the purposes of subsection (3) of section fifty-nine of the Finance (1909-10) Act, 1910 (which relates to the surrender of benefits reserved).

(3) In the last foregoing subsection—

(a) the reference to any operations associated with the disposition shall be taken as referring to any associated operations as defined by section fifty-nine of the Finance Act, 1940, of which the disposition is one: and

(b) the reference to any operations associated with the determination shall be taken as referring to any associated operations as so defined of which any disposition resulting in, or effected in contemplation of or with reference to, the determination is one.

(4) This section shall have effect in relation to any death occurring after the eighteenth day of April, nineteen hundred and fifty, whether or not the relevant interest is disposed of or determines after that date.'

¹² E.g., 'Subs. (1) and (2) of s. 43 of the F. A. 1940 (as amended by the 11th Sched. to the F. A. 1946) shall be amended as provided by Part I of the 7th Sched. to this Act and accordingly shall have effect as set out in Part II of that Sched.'

¹³ It was this subsection that was held up to contumely in *The Times*' correspondence columns. See *The Times* newspaper, June 22, 1950.

¹⁴ Lest this language should be thought exaggerated, see the remarks of Lord Radcliffe, in 10 Cam.L.J. at p. 368, which, though of course more polished, are equally strong.

taxation has become a battle between the Revenue and the tax-evaders and that accordingly it is necessary for the Revenue's draftsman meticulously to stop up every gap as it appears. That there is a battle is true; that the Revenue are using the right weapons is very doubtful. Certainly their fire is not proving very effective; the evaders are always one move ahead. Before the ink of section 26 (considered above) was even dry, the tax experts in the Temple were boasting that they had thought of half-a-dozen ways through it, and even the most inexperienced eye can see that it is as full of holes as a cullender. May it not be, that it would be more effective to build a broad new dam rather than laboriously to block up every separate hole in the old leaky structure? It is well known that the section which proved most effective in the prevention of surtax evasion was section 18 of the 1936 Act which in reality adopted the technique suggested. Although the section was marred by much of the traditional jargon, in essence it ceased to aim at the particular and struck out boldly at the general by providing that transfers abroad should not affect surtax liability unless the taxpayer could prove that the object of the transaction was not tax avoidance. This precedent,¹⁵ although completely alien to our modern technique of parliamentary draftsmanship is, it is suggested, one which might well be followed. It shows, it is submitted, that a general barrage laid down on the enemy's centre is more effective than individual sniping on the flanks and that if the draftsman really cares more for victory than for the excitement of the battle¹⁶ he should cease trying to mop up each separate breakthrough, and go into the attack with modern atomic weapons rather than defend with smoke screens and gas.

Our argument is not directed solely at Finance Acts; they are the worst offenders but the criticisms apply to a greater or lesser extent to all modern statutes and to much delegated legislation. And they are gradually getting worse. A comparison between, say, the Partnership Act, 1890, and any enactment of the last ten years will convince the reader that there has been a grievous falling-off, not only in elegance but in precision, clarity and general efficiency. The whole of our modern drafting technique seems to be based upon the obviously fallacious assumption that it is possible to cover every particular eventuality. Is it not time that we gave up trying to do the impossible and concentrated instead in laying down broad general principles?¹⁷ The trouble is that once one has caught the habit of particularising it is difficult, and sometimes dangerous, to

¹⁵ Its technique was in reality based upon a similar exclusion of 'artificial transactions' originally introduced during the first world war in connection with excess profits duty (F. A. 1915, s. 44 (3) and Sched. IV, Part I, para. 5) which still applies to Profits Tax (F. A. 1937, Sched. IV, para. 10).

¹⁶ A study of recent Finance Acts prompts the (doubtless) unworthy suspicion that he enjoys it as much as his adversaries.

¹⁷ Dare one suggest that in this respect we have something to learn from the Continent?

leave off. The first time a parliamentary draftsman added the words 'either personally or through his agents or servants' he was patently guilty of verbosity—the general principle that an act can be done through an agent, would have applied, without its being necessary expressly to say so. But once he had started the habit his successors dared not omit these words lest some ingenious counsel argued that their inclusion in the earlier Acts and omission in the later was significant. The result is that a rash of otiose verbiage is spreading across the once relatively fair face of our statutes and that the contagion will spread further unless drastic steps are taken to purge the system.

Here again, the legal profession cannot afford to be complacent. It is easy to complain when sections such as this are described as 'legal language'. Certainly they are not the language of the judgments of Macnaughten or Sumner, of the books of Maitland or Dicey, of the L.Q.R. or (we hope) of the M.L.R. Nevertheless, they are the language of a lawyer and, largely, for lawyers and because of lawyers, and they constitute an important source of law for which we can no more escape responsibility than for judicial decisions or other legal writings or documents. Unhappily there is not much that we can do about it.¹⁸ But we can at least protest.

L. C. B. G.

¹⁸ Dr. G. R. Y. Radcliffe, in the course of *The Times*' correspondence suggested that the remedy was in the hands of M.P.s who should refuse to pass legislation which they did not understand. This solution, although certainly the ideal to be aimed at, would probably result in a complete cessation of parliamentary activity if introduced all at once. Thus, although attractive at first sight, it would, it is feared, merely result in 'the much needed gap' being filled by further delegated legislation.

REPORTS OF COMMITTEES

REPORT OF THE GOWERS COMMITTEE ON HOUSES OF OUTSTANDING HISTORIC OR ARCHITECTURAL INTEREST (H.M.S.O.)

THE Gowers Report is primarily concerned with devising a scheme for saving the great country houses of England from ruin and decay. The proposals made are, however, not only of great interest from the point of view of protecting ancient buildings, but also because they include as one of the major remedies a far-reaching scheme for relief from taxation which is certain to meet with opposition; but which if adopted by the government may perhaps be the forerunner of other schemes for tax relief.

The Committee find that the main reason why the great country houses are falling into ruin is the 'burden of taxation'. As costs are running at present the annual repairs account for the bigger houses may well reach a larger figure than any income which it is possible for the owner to receive after paying income tax and surtax. They therefore propose that in respect of a house which is accepted as of the required standard of importance an owner should be 'exempt from income tax and surtax on so much of his income as is reasonably necessary to maintain the house'. They propose also a remission of death duties in respect of such houses, and also in respect of any maintenance fund which he may set up in order to provide an income to keep the house in repair. Various methods are suggested for carrying through this latter proposal without providing loopholes for abuse. But in respect of the proposed remissions both of income-surtax and death duties, the scheme is left very vague.

The Committee are well aware of the revolutionary, or should one say counter-revolutionary, character of their proposals. As they say 'the private owner of a house is an individual taxpayer, and the orthodox canons of taxation require all individual taxpayers to be treated alike if the circumstances affecting their taxability are the same. The idea of differentiating between taxpayers on any other ground—of introducing an element of "privilege", in the original sense of that word—is regarded with abhorrence by the theorist, and with apprehension by the administrator, who fears the unforeseeable consequences of making a breach in the symmetry of the tax code'.

As the Committee point out, there are a few cases where in the national interest tax remissions are already granted—they refer for example to the special arrangements made 'to put at the disposal of the Prime Minister resources consistent with the

responsibilities of his office'.¹ A nearer case is the remission of death duties in respect of certain works of art, and also of historical monuments left to and accepted by the Ministry of Works. But these cases, which are practically speaking not of much importance, are hardly on a par with the Committee's proposals. A much more apposite case is that which occurs when an owner gives his house with a maintenance fund to the National Trust and is then permitted by the Trust to continue to live there rent free provided he allows limited access to the public to visit it. Since the National Trust is a charity the income from the maintenance fund escapes taxation, and under the Trust's special act the gift of the house escapes death duty, as does any endowment fund given with it.

The Committee point out with justice that those owners who take advantage of the National Trust scheme have in effect secured a large measure of exemption from taxation. But many owners are not in a position to meet the Trust's somewhat severe requirements in respect of a maintenance fund. The Committee's proposals would not in reality put an owner who was able to adopt them in a better position than one who had made an arrangement with the National Trust. They therefore suggest that the time has come to be realistic, and to put aside the theoretical and ideological objections to special tax privileges. Certainly if the country houses which are, perhaps, this nation's outstanding contribution to the visual arts can be saved in no other way, all but the most doctrinaire radicals should be prepared to waive their objections. It is likely, however, that the government will look very carefully for some alternative method of securing the desired result, for the repercussions of accepting the Gowers scheme might be many and various.

C.

¹ This presumably refers to the provision made by the Income Tax Act, 1918, Schedule E, r. 10, under which the Treasury may exempt from tax that part of the income received from public funds which the person in receipt of it necessarily lays it out in the performance of his duties. This is not of course limited to the Prime Minister.

NOTES OF CASES

ESTATE AGENTS' COMMISSION

THE legal relationship between a potential vendor of house property and the estate agent whom he instructs has unusual features entailing risk of hardship to both. 'When a house-owner puts his house into the hands of an estate agent, the ordinary understanding is that the agent is only to receive a commission if he succeeds in effecting a sale, but if not he is entitled to nothing. . . . The agent in practice takes what is a business risk. He takes on himself the expense of preparing particulars and advertising the property in return for the substantial remuneration—reckoned by a percentage of the price—which he will receive if he succeeds in finding a purchaser'.¹ Unlike an ordinary agent, therefore, he is normally not entitled to any indemnity in respect of his expenses incurred on the principal's behalf. Hence he has a genuine complaint if, after he has gone to considerable trouble and incurred substantial expense in finding a potential purchaser, his principal capriciously withdraws from the negotiations. On the other hand if his position is safeguarded so as to entitle him to a commission once he has effected an introduction of a willing purchaser hardship may be caused to the house-owner who has instructed more than one agent each of whom introduces a willing purchaser and thus becomes entitled to a commission rightly described as 'substantial'.²

The spate of recent cases on this subject is an interesting illustration of the way in which the courts strive to preserve a proper balance between competing interests, but a disheartening example of their occasional lack of success. For the purposes of a brief survey of the recent cases we may start in 1934 when *Trollope & Sons v. Martyn Bros.*³ held that if the principal unreasonably refused to sell to a willing purchaser introduced by the agent he was liable to the agent either on a *quantum meruit* or in damages for having wrongfully deprived him of the opportunity of earning his commission. This decision was followed in *Trollope & Sons v. Caplan*⁴ and stood until 1941 when it was overruled by the House of Lords in the leading case of *Luxor (Eastbourne), Ltd. v. Cooper*.⁵ It was there held that the agent's rights depended solely on the express terms of the engagement and that it was not possible to

¹ Per Denning L.J. in *Dennis Reed v. Goody* [1950] 1 All E.R. 919 at p. 923.

² The scale agreed by the professional bodies and expressly or impliedly incorporated into the agreement is 5 per cent. on the first £300, 2½ per cent. of the next £4,700 and 1½ per cent. thereafter.

³ [1934] 2 K.B. 346.

⁴ [1936] 2 K.B. 382.

⁵ [1941] A.C. 108.

imply a term that the principal would not withdraw from the negotiations prior to the fulfilment of the condition upon which commission was to be payable. Until a legally binding agreement of sale was entered into the principal was entitled to withdraw; by so doing he did not act wrongfully and hence the agent was not entitled to claim commission, or damages, or on a *quantum meruit*. In the *Luxor Case* the agreement expressly provided that commission should be payable on completion of the sale, but it was conceded in the judgments⁶ that once a binding contract was entered into the principal could not deprive his agent of commission (or damages in lieu) by refusing to complete. Later cases established that the same rule applied if the terms of appointment provided for payment of commission 'upon introducing a purchaser'; in such circumstances it seems to have been assumed that the agent had a vested right to his commission once a binding contract was entered into,⁷ although this right was liable to defeasance if the purchaser refused to complete.⁸ †

But the judgments of the House of Lords in the *Luxor Case* recognised that the contract between the principal and agent might be so framed as to entitle the agent to commission upon the introduction of an applicant who made an offer even although it was never accepted.⁹ Estate agents were swift to take the hint. In *Giddys v. Horsfall*¹⁰ the formula used was that commission would become payable 'in the event of our being instrumental in introducing a party prepared to purchase on the terms of your instructions'. The agents introduced someone who made an offer 'subject to contract' at the price required but the owner refused to sell. Lewis J. held that the agent was nevertheless entitled to his commission as the condition on which it was payable had been fulfilled.

It will be observed that in the *Giddys Case* the technical word 'purchaser' had not been used. Later cases, however, established that this was not essential provided that the words used showed an intention that the agent should be entitled upon introducing someone able and willing to become a purchaser whether or not he actually did so.¹¹ This line of cases removed the hardship to the agent and in practice restored him to his position under *Trollope v. Martyn* (*supra*), provided that he took care to use the right formula

⁶ See especially pp. 126 and 142.

⁷ *Jones v. Lowe* [1945] 1 All E.R. 194; *Fowler v. Bratt* [1950] 1 All E.R. 662. This view prevailed until as recently as *McCallum v. Hicks* [1950] 1 All E.R. 864. The judgments of the House of Lords in the *Luxor Case* leave this point obscure.

⁸ *Poole v. Clarke* [1945] 2 All E.R. 445 following *Martin v. Perry & Daw* [1931] 2 K.B. 310 and *James v. Smith*, *ib.* 317 n. As Bankes L.J. said in the latter case, at p. 318, 'purchaser' means 'a purchaser able to purchase and able to complete as well'.

⁹ See especially Lord Simon at p. 120 and Lord Russell at p. 124.

¹⁰ [1947] 1 All E.R. 460.

¹¹ *Dennis Reed v. Nicholls* [1948] 2 All E.R. 914 and *Bennett & Partners v. Millett* [1949] 1 K.B. 362.

when setting out the terms of his engagement. On the other hand it left the owner in a highly vulnerable position, for if he had engaged more than one agent on these terms he might find himself legally liable to pay commission to all of them. This situation actually arose in *Nelson & Co. v. Rolfe*,¹² a Court of Appeal decision which represents the furthest point of advance made by the agents. In that case the plaintiffs had been engaged on the terms of the *Giddys'* formula, i.e., that they should be entitled to commission upon introducing a person able, ready and willing to purchase at a particular price. They introduced a Mr. Payne, who, it was conceded, was willing and able to buy at that price, but the owner refused to sell as he had previously granted an option to an applicant introduced by another agent, an option which was in fact subsequently exercised, thus rendering the owner liable to pay commission to the second agent. It was argued on behalf of the owner that the contract with the plaintiffs was subject to two implied terms—(1) that the commission was payable only in respect of the first introduction by any agent, and (2) that if the principal should take the property off the market 'justifiably' in a business or moral sense, he should not be liable for commission in respect of any subsequent introduction. The court held, rightly it is respectfully submitted, that neither term could be implied. As emphasised in the *Luxor Case*, the court could only imply such terms as were necessary in a business sense to give efficacy to the contract. It was conceded by the plaintiffs' counsel that some limitation had to be implied and he suggested, and the court apparently agreed,¹³ that the agent would not be entitled to commission if the introduction was effected (i) after the agent's instructions had been withdrawn; (ii) the property had been sold; or (iii) a binding contract of sale had been entered into. It is a little difficult to see why it is necessary to imply limitations (ii) or (iii) in order to give business efficacy to the contract; from the agent's point of view it is not unreasonable that he should insist that his authority should be expressly withdrawn and that he should not be damnified by a sale or contract of which he is ignorant. Perhaps, however, these limitations may be best explained by saying that after a binding contract has been entered into no other applicant can be regarded as fulfilling the condition that he should be 'able' (as opposed to 'willing') to purchase, the vendor being no longer able to sell to him.

It was Roxburgh J. a few months later, in the case of *Graham & Scott v. Oxlade*,¹⁴ who started the pendulum swinging back in the opposite direction. Here again the agents had been employed on the same terms as those in the *Giddys v. Horsfall* line of cases. They introduced an applicant who offered to buy 'subject

¹² [1950] 1 K.B. 139.

¹³ *Per* Cohen L.J. at p. 146.

¹⁴ [1950] 1 All E.R. 91.

to contract and satisfactory survey', which offer was accepted. The owner then withdrew and sold elsewhere. The learned judge held that as the applicant's offer was 'subject to survey' the agents had not shown that he was a willing purchaser and Roxburgh J. made it clear that but for the earlier cases he would have come to the same conclusion had the offer merely been qualified as 'subject to contract'. Hence the agents were not entitled to commission. The Court of Appeal¹⁵ upheld this decision deciding that an applicant could not be regarded as 'willing to purchase' if his offer was subject to any unfulfilled condition such as 'subject to contract' or 'subject to survey'. *Nelson v. Rolfe* was distinguished on the ground that there it had been conceded (wrongly as it now appeared) that the applicant was 'willing to purchase' and *Giddys v. Horsfall* and the other decisions of judges of first instance which follow it, were overruled. A few days later this decision was confirmed by a differently constituted Court of Appeal¹⁶ in *McCallum v. Hicks*¹⁷ and *Dennis Reed v. Goody*.¹⁸

The judgment of Denning L.J. in the latter case is particularly illuminating, for in it he went back to first principles and re-stated the whole legal position in clearer terms than had formerly been attempted. He pointed out that in the normal terms of engagement of an estate agent it is intended that his commission shall only be payable on completion and out of the purchase money. In his view, therefore, it was not correct to state, as he himself had done in *McCallum v. Hicks* (*supra*), that the agent was entitled to his commission once a binding contract had been entered into. It was true that in such circumstances the principal could not deprive the agent of commission by refusing to fulfil his contract of sale but this was because he could not rely on the non-completion in order to avoid payment of commission, since this was due to his own fault. If, however, it was the purchaser who repudiated the contract, the agent was not entitled to his commission (see the cases cited in note 8) and the vendor was not bound to bring an action to enforce the contract simply in order to enable the agent to obtain commission, although if he did get his money he would probably be bound to pay commission out of it. Where, however, there never was a binding contract, the agent was not entitled to commission whichever party withdrew. No doubt, it was possible for the parties to agree that the agent should obtain his commission, not only upon sales, but also upon offers, but if so, as the House of Lords had stressed in the *Luxor Case*, they must use clear and unequivocal language. Where the language used was capable of two constructions, one reasonable and one unreasonable, the court would

¹⁵ [1950] 1 All E.R. 856 (Cohen, Asquith and Singleton L.JJ.).

¹⁶ Bucknill and Denning L.JJ. and Hodson J.

¹⁷ [1950] 1 All E.R. 864.

¹⁸ *Ibid.* 919.

adopt the reasonable construction. In his view it was not reasonable that agents should obtain full commission merely because they had introduced someone who made an offer, although it might be reasonable for them to ask for out-of-pocket expenses or even a reasonable reward for time and labour. He could see no sensible distinction between 'find a purchaser', 'find a party prepared to purchase', 'find a purchaser able and willing to complete the transaction', and 'find a person ready, willing and able to purchase'. 'The rights and liabilities of house-owners should not depend on fine verbal differences'. And even if agents did adopt some other formula clearly entitling them to commission on mere offers they should bring it specifically to the notice of the house-owner and get his specific agreement to it. Otherwise 'the courts might well say to the agents: "If you insert stringent terms giving you more than is reasonable, without explaining what you have done, you shall not have the aid of these courts to enforce them"'. That, however, would be a strong course to take, and the courts prefer to construe the terms so as to give them a reasonable effect: see *John Lee & Son (Grantham) Ltd. v. Railway Executive*'.¹⁹

It will therefore be seen that if Denning L.J.'s opinion is correct there is no distinction between the normal terms and the *Giddys*' formula; in neither case is the agent entitled to commission until completion or the vendor's repudiation of a binding contract. In this respect, however, he seems to go beyond the actual *rationes decidendi* of the cases and the opinion of his colleagues. These, it is submitted, establish the following propositions:—

1. If the contract provides that the agent is entitled to commission upon introducing a party able and willing to purchase then the onus of proof is on the agent to show as a question of fact that the applicant introduced by him was both able and willing (*Graham & Scott v. Oxlade*).

2. To prove that the applicant was 'able' the agent must show that the applicant would be in a position to raise the purchase price at the time when it would become payable (*Dennis Reed v. Nicholls*, which appears still to be good law on this point) and that the property was still purchasable when he effected the introduction and not already sold or subject to a binding agreement for sale to another (*Nelson v. Rolfe*).

3. To prove that the applicant was 'willing' it is not sufficient to show that he made an offer 'subject to contract' or 'subject to survey' or, presumably, qualified in any other way; on the contrary the existence of such a qualification shows that until it is fulfilled the applicant is not willing (*Graham & Scott v. Oxlade*).

4. But it would appear that if the applicant makes a firm unqualified offer or if the conditions of his offer are fulfilled (e.g.,

¹⁹ [1949] 2 All E.R. 581. Noted above at p. 100.

if he expresses satisfaction with the survey) before the owner withdraws the agent's authority, then the agent has *prima facie* established that the applicant is willing (*ibid*). But the owner may still defeat the agent's claim if he can prove that the applicant subsequently withdrew his offer (*Dennis Reed v. Goody*) or repudiated the contract (*Poole v. Clarke*, *Martin v. Perry & Daw* and *James v. Smith*). Moreover, it seems that the offer must be one capable of being turned into a binding contract by simple acceptance by the owner and it is arguable that it must be evidenced by a sufficient signed memorandum so that on acceptance it is enforceable by the owner (cf. *Fowler v. Bratt*). Subject to this, however, it seems that there is a distinction between the *Giddys'* formula and the normal terms in that in the former case the agent does not have to show that there has been a binding contract; an unaccepted firm offer will do. *XN*

5. Whether or not the propositions propounded in para. 4 are correct in the case of the normal *Giddys'* formula of 'an applicant able and willing to purchase' there is now authority for saying that agents can secure the more favourable position, as there set out, by an appropriate variation in wording. In the even more recent Court of Appeal case of *Bennett, Walden & Co. v. Wood*²⁰ the words used were that commission should be payable 'in the event of our securing for you an offer'. Evershed M.R., in a judgment in which the two other members of the court concurred, expressly negatived the view that this variation was equivalent to 'find a purchaser' and thought that the agents would be entitled upon introducing an applicant who made a firm offer. In view of the suggestion of Denning L.J. that the court might refuse to enforce such a term unless brought specifically to the owner's notice, it is interesting to observe that there is nothing in the report to suggest that this stringent term was ever brought specifically to the notice of the house-owner; the agents seem merely to have included it in their letter of confirmation to which the owner never replied. In fact, however, the offer made was 'subject to contract' so that the agents did not succeed. This variation therefore does not take agents as far as some of them want to go, but it seems to be only a matter of time before some enterprising firm use the words 'we shall be entitled to the usual commission upon introducing an applicant who makes an offer, whether or not subject to contract or survey or qualified in any other way . . .'; it is, alas, all too doubtful whether the average unwary owner will bother to dissent from it. This decision, therefore, seems to foreshadow a swing of the pendulum back in favour of the agents.

6. There is one other respect in which there may be a difference between the position of the agent according to the type of formula

²⁰ [1950] 2 All E.R. 134 (Evershed M.R. and Asquith and Jenkins L.JJ.).

used. Under the normal terms of engagement an agent remains under a duty to forward offers to his principal until there is a binding contract of sale notwithstanding that the principal has already agreed to sell 'subject to contract'.²¹ If, however, the agent is engaged under the *Giddys*' formula, or its latest variation, it may be argued that the agent becomes *functus officio* once an applicant introduced has made a firm offer, whether or not it has been accepted. It is not thought that this argument would succeed; it obviously would not with Denning L.J., and even without going all the way with him one may agree that the agent still has duties to the principal until final completion and must do his best to get the highest price so long as the principal is still free to accept it.

7. We may conclude this survey of the legal position by pointing out that justice may be done to both parties if the agent is appointed 'sole agent'. In such circumstances the agent will be entitled to damages for loss of his commission if the owner sells through another agent.²² In this case such a consequence is perfectly reasonable from the owner's point of view, since he must realise that he has no right to instruct another agent and if he does he cannot fairly complain. Even in such a case the agent will not be protected if the owner sells himself without the introduction of any agency,²³ but this, too, can be covered by the use of appropriate wording.²⁴ The only hardship which cannot be guarded against is that the owner will change his mind and not sell at all, or will refuse to entertain any offers until after the period of the sole agency has expired.²⁵

So much for the present legal position. We may now ask whether it can be regarded as satisfactory and whether in fact the law here meets the ends of justice. It can hardly be doubted that the answer is in the negative. Despite the valiant attempt by Denning L.J. to secure uniformity it seems that the rights of agents depend upon subtle variations of terminology, which the principals probably never notice and the implications of which they certainly do not understand (how could they when legally trained judges have differed so widely in their interpretation?). Normally the agent gets nothing unless his applicant purchases, notwithstanding that his failure to do so may be due to the whim or caprice of the principal, so that the agent certainly deserves something for his trouble. But if a different terminology

²¹ *Keppell v. Wheeler* [1927] K.B. 577.

²² *Hampton & Sons v. George* [1939] 3 All E.R. 461; *Christopher v. Essig* [1948] W.N. 461, notwithstanding a subtle argument in the latter case that there was no consideration for the principal's promise not to employ another agent. Presumably the breach of contract occurs when the other agent is appointed, not when he sells; the sale merely crystallises the damage which the first agent suffers.

²³ *Bentall, Horsley & Baldry v. Vicary* [1931] 1 K.B. 253.

²⁴ 'The sole and exclusive right to sell.'

²⁵ In the last case the agent has the strongest possible moral claim for compensation on a *quantum meruit*, but it is not clear that the law would sustain it.

is used, he obtains his full commission which may be far more than the principal ought to have to pay and, moreover, the principal may have to pay to more than one agent in respect of the same transaction. During the last twenty years the courts have swung from one side to the other and have now adopted a solution which preserves an equilibrium only in the sense that it is about equally unjust to both parties. The present position is an encouragement to the unscrupulous agent to insert terms to which the principal would not agree if he understood them, or what is worse, to persuade the parties to sign a binding contract of sale without previous reference to their respective solicitors. The latter course, which became not uncommon, is totally unfair because the purchaser becomes bound without having the opportunity of withdrawing after a survey (which may preclude him from obtaining the building society loan on which he has relied) and without making the many searches and inquiries which are now essential before contract.²⁶ It is also objectionable from the point of view of the vendor who may find himself bound by an open contract, the obligations of which he cannot fulfil. Hence on the representations of the Law Society, the various professional bodies of estate agents instructed their members not to adopt this course, a direction which seems to be loyally followed by those agents, unhappily far from all, who are members of such bodies.

It is understood that one of the recent cases may go to the House of Lords, and if so it may be that the House will further explore the trail blazed by Denning L.J. in *Dennis Reed v. Goody*, which points the way to a fairer conclusion based on the premise that the agent shall only obtain his full commission if a sale is effected, but may obtain something for his trouble if not; a conclusion reached by Pollock C.B. in *Prickett v. Badger*,²⁷ but disapproved by the House in the *Luxor Case*. In view, however, of the judgments in that latter case it is difficult to see how such a decision is within the reach of judicial interpretation unless the courts are prepared drastically to censor the parties' contract and to rewrite it for them on principles of *aequum et bonum*. This is a last resort from which Denning L.J. (as we have seen) does not flinch and for which the early equity cases on 'surprise' might furnish some authority²⁸; moreover, he has recently persuaded the court to take rather similar action in another branch of the law of contract.²⁹

²⁶ This happens, of course, on a purchase by auction but that does not make it any the less objectionable.

²⁷ (1856) 1 C.B.(N.S.) 296.

²⁸ See, for example, *Bath & Montague's Case* (1695) 3 Cas. in Ch. 55; *Evans v. Llewellyn* (1787) 1 Cox 333; *Townsend v. Strongroom* (1801) 6 Ves. 328; *Pickett v. Loggon* (1807) 14 Ves. 215; and *Willan v. W.* (1809) 16 Ves. 72.

²⁹ *Lindsay Parkinson & Co. v. Commissioners for Works* [1950] 1 All E.R. 208 and *British Movietone News v. London & Dist. Cinemas* [1950] 2 All E.R. 390.

Without some such major operation it seems that the courts, with their devotion to the principle of freedom of contract, have got the law into a mess from which they cannot rescue it without outside aid. Since statutory intervention is unlikely, the obvious solution is for the agents themselves to provide that aid. What is needed, surely, is the general adoption of a standard form³⁰ of contract by agents which will contain a provision somewhat on the following lines: 'Commission shall only be payable upon the actual completion of a sale to an applicant introduced by the agent. Provided, however, that if the sale shall not be completed owing to the default of the owner the agent shall be entitled to a reasonable sum to compensate him for his expenses, time and labour. In the event of dispute as to whether the owner is in default or as to what is a reasonable sum of compensation the dispute shall be referred to the President for the time being of the ———— Institute whose decision shall be final'. Such a clause, it is submitted, is one to which no reasonable house-owner could object provided that there was a reliable Institute. So indeed there is—more than one—but unhappily they do not control all estate agents. It is open to anyone to set up business as an estate agent and to refuse to be bound by the special codes of professional conduct enjoined by the professional organisations. While this is so, no standard contract can meet the need, for there will be no guarantee that the outside agents will use it. It is understood that the professional bodies have been far from sympathetic towards some of the recent efforts by agents to obtain commission on abortive sales. While it is not suggested that all estate agents who refuse to join these bodies are unreliable or unscrupulous, there seems no doubt that the absence of professional control over the whole profession is a serious danger, generally as well as in connection with the particular problem under discussion.³¹

³⁰ A fascinating field of research is open to the student who will investigate the extent to which 'freedom of contract' has succumbed to 'standard forms'. A preliminary survey of the topic was undertaken by Dr. Prausnitz in his 'Commercial Contracts' (Lond. 1937).

³¹ Two illustrations within the writer's own knowledge may be of interest. In the first, a house-owner, having sold his house and bought another, concluded that estate-agency was an easy way of making money. He therefore put up a board outside his house and persuaded one or two friends to place their homes on his books. When he in fact found an interested applicant he knew so little about the job that he had to telephone the agent who had previously acted for him to ask what he should do next! In the second a semi-illiterate old lady was trying to sell a small cottage. The estate agent had an applicant who was nibbling at £800 but the agent wanted to buy himself. He therefore prepared a contract of sale in his own favour at the price of £600, persuaded his client to sign it and sent it to her solicitors with a cheque for the deposit less agents commissions (sic). As a result of protests to his solicitors, the latter wrote that they had advised their client not to seek to enforce the contract but that they wished to make it clear that he had honestly believed that it was consistent with his duty to persuade his client to sell to himself at the lowest possible price!

By their failure, therefore, to put their house in order the agents are to some extent the authors of their own misfortunes. Nor need too much sympathy be wasted on them, for they have undoubtedly had an extremely profitable five-years since the war. Because of vastly increased house prices, they have earned much higher commissions and, in a sellers' market, have earned them with far less effort than the scales were designed to reward. In this connection it may be suggested that the scales themselves³² are a part cause of the trouble. Today every house sold fetches considerably more than £300 and a large number sold with vacant possession more than £5,000, so that every additional £100 on the price only means £2 10s. at the most, and often only £1 10s., to the agent. In these circumstances it obviously pays the agent far better to secure a quick and easy sale for, say, £5,000, than to work hard to get £5,200, particularly as delay means that he may be forestalled by another agent³³ and get no commission at all. The frequency with which negotiations go off because the vendor receives a higher offer elsewhere, strongly suggests that many agents are not in fact doing all they could to get the best prices for their clients. It is for consideration whether, under present conditions, it would not be fairer to both parties if the percentage payable to the agent increased, instead of diminished, in the higher price ranges so that the agent would really have some inducement to strive for the highest possible price.

It would also be possible for the legal profession to make a contribution towards the solution of the problem. In the last twenty years there has been a radical change in conveyancing practice. Previously it took about a week to negotiate the contract and a month thereafter for completion. Now it normally takes a month to agree the contract and only about a week for completion since the most important investigations are carried out prior to contract. In the meantime either party is free to withdraw and cannot safely assume that the other will not. This is not satisfactory to the parties, who want to know where they stand, and incidentally is a contributory cause of the hardship to agents, who may lose commission in consequence, and an encouragement to them to seek to safeguard themselves by unreasonable provisions of the type previously considered. It is widely recognised that what is needed is some standard form of contract of sale which could be signed immediately but which would enable the purchaser to rescind for reasonable cause, such as failure to obtain planning permission to an intended change of user or the discovery of a proposal to drive a trunk road

³² See note 2, *supra*.

³³ It is because of this that a sole agency may be in the best interests of the owner as well as the agent, since the agent can take time to obtain the highest possible price without incurring the risk of being beaten at the post by another agent.

through the garden. It should not be beyond the wit of conveyancers to devise such a contract and the Law Society would be doing a great service to the public and the profession if they could commission it and secure its general adoption. If this were done opportunities for capricious withdrawal from negotiations would be minimised, purchasers could safely buy at auctions, and incidentally estate agents would be reasonably protected.

L. C. B. GOWER.

VALIDITY OF MINISTERIAL ORDERS

In *Underhill v. Ministry of Food* [1950] 1 All E.R. 591 the plaintiffs sought an interlocutory injunction to restrain the defendant from carrying out or further publicising his proposal to bring sweets, manufactured from ingredients not hitherto subject to controls, under the rationing system; alternatively, they sought a declaration that the defendant was not entitled until trial or further order to carry out or further publicise this proposal.

The Crown Proceedings Act, 1947 (section 21), provides that 'where in any proceedings against the Crown any such relief is sought as might in proceedings between subjects be granted by way of injunction . . . , the court shall not grant an injunction . . . , but may in lieu thereof make an order declaratory of the rights of the parties'. In view of this, the plaintiffs, at the hearing, asked for the alternative form of relief, namely, a declaration. Their grounds were (i) that the proposed order was *ultra vires* the Supplies and Services (Transitional Powers) Act, 1945, which was the Minister's authority for the order; (ii) the Minister's bad faith; and (iii) an estoppel based on assurances or representations alleged to have been made by the Ministry. Romer J. agreed with counsel for the Ministry that the court had no jurisdiction 'to make a kind of interim declaration in substitution for the interlocutory injunction which clearly it has no power to grant'. The effect is that the declaration referred to in the Crown Proceedings Act, 1947, is a final declaration. Romer J. said: 'I do not think that this court has jurisdiction under section 21 of the Act to make something in the nature of an interim declaration of right which would have no legal effect, and which . . . might be the very opposite of the final declaration of right made at the trial after hearing all the evidence and after all the matters in issue had been gone into at length'. The difficulty is that an interlocutory injunction is not meant to be a remedy but is designed to 'freeze' the situation so far as possible until the judgment is given at the trial. For this purpose a declaration is obviously inappropriate, although a 'final' declaration will normally have the same effect as an injunction given at the trial by way of remedy.

The argument of the court amounts to this : (1) The Act says that the court cannot grant an injunction but may make a declaration. (2) This provision entitles the court to make a declaration in place of a 'final' but not in place of an interlocutory injunction. The answer would seem to be : (1) Since the Act clearly intended declarations to take the place of injunctions, and since interlocutory injunctions cannot be replaced, with the same effect, by interim declarations, then the Act must refer only to 'final' injunctions. (2) Therefore interlocutory injunctions are not affected by the Act and may be granted against the Crown. The plaintiffs claimed that they would be forced to stop manufacturing if the order were made. If so, it would seem to be more equitable that their claim that the proposal was *ultra vires* or otherwise illegal should be settled, if possible, before the order came into effect. His Lordship then examined the three grounds put forward by the plaintiffs, although he had said sufficient to dispose of the motion, because of the arguments advanced. Unfortunately, this part of his judgment is not reported except in these words : 'The Ministry's proposal could not be *ultra vires*, in view of the terms of section 1 of the Act of 1945, unless it was *mala fide*, and . . . he was unable to see how the plaintiffs' claim could be based on estoppel'. One would like to have seen what he said, especially on the last point, and whether the principle of *Robertson v. Minister of Pensions* [1948] 2 All E.R. 767 was discussed.

In *Thorneloe and Clarkson, Ltd. v. Board of Trade* [1950] 2 All E.R. 245 the plaintiffs sought a declaration that the Clothing Industry Development Council Order, made under the Industrial Organisation and Development Act, 1947 (section 1), was *ultra vires* or void. By this Act : 'A development council order shall not be made unless the board or minister concerned is satisfied that the establishment of a development council for the industry is desired by a substantial number of the persons engaged in the industry'. The total number of firms in the industry was 24,000 of which 6,000 belonged to trade organisations. Of these 6,000 firms, 4,500 (belonging to sixteen trade organisations) opposed the order when it was proposed. The total number of employees was 474,000. Of these, 150,000 (in two unions) expressed a desire for the establishment of the council.

Sellers J. held that the Board needed to be satisfied that a substantial number of *all* the persons engaged in the industry wanted the council but did not need to be satisfied that a substantial number of employees *and* a substantial number of employers wanted it. He decided that there was evidence on which it was reasonable to conclude that the Board was so satisfied, but he discussed the extent to which the court could consider the grounds for the Board's satisfaction. His Lordship hinted that the court might examine these grounds 'if there had been a misdirection by

the Minister as to the law, or if it had been established that there was no support whatsoever from the industry for this development council order'. It is not clear what his first suggestion means. His second suggestion can only relate to the meaning of the word 'substantial' in the Act. Earlier in his judgment, his Lordship had refused to define more precisely the meaning of this word. 'To do so', he said, 'would, I think, be to act as a legislator and not at a judge'. If, however, he was prepared to upset the order if no one had supported the proposal, he would presumably have been prepared to do so if only one or twenty or two hundred had done so. He indicated that he thought 150,000 out of 474,000 was a 'substantial' number. If the court is prepared to consider the grounds of the Board's satisfaction at all, it must be prepared to decide what is 'substantial' for the purpose of the particular order. There is no difference in kind between 'no support whatsoever' and 'substantial' support, just as there is no distinction in kind between what is an 'unreasonable' decision and what is a decision 'so unreasonable that no reasonable authority could ever have come to it' (see Lord Greene M.R. in *Associated Provincial Picture Co. v. Wednesbury Corporation* [1948] 1 K.B. 223). His Lordship was pressed by counsel for the plaintiffs to distinguish between cases where the Minister is the sole judge and where an 'objective test' could be applied by the court and it was argued that this case fell within the second category. His Lordship, as we have said, refused to pursue this (although he cited the relevant passages in *Point of Ayr Collieries, Ltd. v. Lloyd-George* [1943] 2 All E.R. 546, 547, and *Robinson v. Minister of Town and Country Planning* [1947] 1 All E.R. 851, 857), because 'it has not been shown that there was no evidence' for the Minister's consideration. It is suggested that the 'objective test' is a myth. Parliament decides that a Minister shall consult with certain organisations and decide whether there is a 'substantial' desire. If another individual or group claims that the desire is not 'substantial', what objective test can decide between them? If a judge of the King's Bench Division decides, his decision is as 'subjective' as the Minister's. The only difference is that the Minister can be attacked in Parliament and in the Press, whereas the judge cannot.

J. A. G. GRIFFITH.

REVIEW OF FINDINGS BY RENT TRIBUNALS

MISGIVINGS are often expressed about the substantial immunity of rent tribunals from external control. No appeal lies to any superior body from a decision as to what is a reasonable rent, and the Minister of Health has shown no disposition to follow the recent suggestion by the Lord Chief Justice (*R. v. Brighton Rent*

Tribunal, Ex p. Marine Parade Estates (1936), Ltd. [1950] 1 All E.R. at 950) that an *ad hoc* appellate tribunal might with advantage be set up for this purpose : cf. also R. S. W. Pollard, *Administrative Tribunals at Work*, Introduction, xix. Tribunals must not violate the rules of natural justice (*R. v. Kingston-upon-Hull Rent Tribunal, Ex p. Black* (1949) 65 T.L.R. 209); but, as the *Brighton Case* shows, these rules do not preclude tribunals from acting with an informality that contrasts sharply with procedure in the ordinary courts. Although under the Landlord and Tenant (Rent Control) Act, 1949, tribunals may have to decide difficult points of law, no appeal lies to the courts from their interpretations.

In practice, however, the High Court exercises a limited appellate jurisdiction over questions of law and fact when determining whether a tribunal has acted within its jurisdiction. Thus, it has been held that a tribunal with jurisdiction over furnished premises acts *ultra vires* if it deals with premises that are not in fact furnished; and this question of fact is determined by the court *de novo* on an application for certiorari to quash : *R. v. Blackpool Rent Tribunal, Ex p. Ashton* [1948] 2 K.B. 277. But Parliament may exclude this method of review by providing, *e.g.*, that a tribunal shall have power to act 'if it is satisfied' that the necessary conditions are present. Where under the 1949 Act a rent tribunal has exercised its jurisdiction to fix a reasonable rent for a dwelling-house (section 1), and where 'it appears to the tribunal' that a premium has been paid in respect of the grant, continuance or renewal of a tenancy (Schedule I, Part I, para. 1), it has power (upon an application by the tenant) to reduce the 'reasonable rent' by a sum called the rental equivalent of the premium (Schedule I, Part I, *passim*). It might be thought that a tribunal's decision that a premium had been paid would be immune from judicial review. Nevertheless, in *R. v. Fulham, Hammersmith and Kensington Rent Tribunal, Ex p. Philippe* [1950] 2 All E.R. 211, the Divisional Court held that unless a premium had in truth been paid a tribunal had no jurisdiction to fix a rental equivalent, and that since in the case in hand no premium within the meaning of the Act had been paid the tribunal had acted without jurisdiction in fixing the rental equivalent. The court supported this interpretation by two main arguments : (1) It is necessary to look not merely at the paragraph containing the words 'where it appears to the tribunal that . . . any premium has been paid . . .', but at the Act as a whole. The meaning of 'premium' is defined by section 18 (2). Section 1 (5) prohibits the tribunal from having regard, when assessing a reasonable rent, to 'the fact that any premium has been paid . . .'; the provisions of Schedule I dealing with rental equivalents are to 'have effect in relation to such premiums . . .'. Section 1 (5) 'gives the tribunal its jurisdiction' to fix rental equivalents, and therefore 'the fact that such a premium has

been paid is a condition precedent to the exercise by the tribunal of its jurisdiction under the first schedule' (*per curiam* at 214, 215). With all respect, this reasoning is unconvincing. All that section 1 (5) seems to say is that the payment of a premium is not to be taken into account for the purpose of fixing a reasonable rent but only for the purpose of fixing a rental equivalent. The court read it as meaning that unless the payment of a premium could be established to the satisfaction of the court, the tribunal was without legal power to fix a rental equivalent. Much clearer language would have to be used in section 1 (5) to support such a construction. The case for the construction preferred by the court is further weakened when section 1 (5) is read in conjunction with the unambiguous language of the relevant paragraph of Schedule I. In any event, there does not appear to be any real inconsistency between section 1 (5) and Schedule I. What section 1 (5) must surely mean is that a tribunal, in assessing a reasonable rent, is not to have regard to any sum that it *believes to be* a premium. If, for example, a tribunal were to fix the reasonable rent after having taken into account what it believed, erroneously, to be a premium within the meaning of section 18 (2), it would have acted *ultra vires* just as if the sum had in truth been a premium within section 18 (2). Whether a premium had in truth been paid would be immaterial for the purpose of section 1 (5) and *a fortiori* for the purpose of Schedule I. In each case the opinion of the tribunal is conclusive. (2) The court pointed out that it could review certain findings by rent tribunals in order to keep them within their jurisdiction, and that it would be odd if Parliament had intended to exempt them from judicial control in regard to their functions under Schedule I. Again, however, this fails to meet the objection that the words of the relevant paragraph are unambiguous. It is difficult to see how the words 'if it appears to the tribunal' can be interpreted as meaning 'if it appears to the High Court'.

As long as the findings of rent tribunals remain immune from review except on questions of jurisdiction, it is likely that the courts will continue to treat a wide range of matters as going to the jurisdiction of tribunals, and to deny to tribunals the power conclusively to determine such matters. The present situation is interesting to students of public law, disturbing to practitioners because of the uncertainty of the law, and often disastrous to persons adversely affected by wrong or ill-considered decisions of tribunals where the findings do not relate to matters of jurisdiction.

S. A. DE SMITH.

THE BURDEN OF PROOF IN MATRIMONIAL CAUSES

As a result of recent decisions in the Court of Appeal, the rule laid down by that court in *Ginesi v. Ginesi* [1948] P. 179, that the standard of proof in cases of adultery is the same as in criminal cases, has been rejected, and can no longer be regarded as reliable.

The technique by which the court extricates itself from the net of its own authority is that propounded in *Young v. Bristol Aeroplane Co.* [1944] K.B. 718, and applied by Denning L.J. in *Gower v. Gower* [1950] 1 All E.R. 804. No good purpose is served by a summary account, and the reader is referred to the reports.

As to the standard of proof required, it now seems settled that this is the same for both cruelty and for adultery, and is best expressed in the words used by Sir William Scott in *Loveden v. Loveden* (1810) 2 Hag. Con. 3 :

‘The only general rule that can be laid down upon the subject is that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion’.

These words are cited in *Davis v. Davis* [1950] P. 125 and in *Bater v. Bater* [1950] 2 All E.R. 459. The same two decisions also make it clear that the standard of proof is properly described as ‘strict’, or, ‘beyond reasonable doubt’. But while the standard of proof is clearly higher in adultery and cruelty than in most other civil causes, it is not the same as in criminal prosecutions.

At this point it may be objected, that proof beyond reasonable doubt is the same proof as in criminal prosecutions. Without lengthy argument, it is possible to sum up the position as follows :

Adultery is not properly described as a criminal offence. To support a finding of adultery (and of cruelty) proof beyond reasonable doubt is required. This is not necessarily a criminal standard of proof, however, because,

(1) the words ‘reasonable doubt’ are flexible, and do not impose any absolute standard; (thus in a serious charge, doubt is less easily dispelled than in a trivial charge); and

(2) the rules of evidence are different. For example, the admissibility of confessions and the requirements as to corroboration are different in the Divorce Court to what they are in the criminal courts.

D. C. POTTER.

RELIGIOUS UPBRINGING

A CENTURY ago it was the father who had the right to the custody of his children, and who decided all questions relating to their upbringing and education. The mother had no say. That state of affairs has been changed, however, and statute law now places both parents on an equal footing, so that the claim of the father is no longer superior to that of the mother. The view has nevertheless been widely held, that the religious upbringing of a child, in spite

of section 1 of the Guardianship of Infants Act, 1925, can still be dictated by the father. (See *Halsbury*, vol. xvii, p. 669).

But in *Re Collins* [1950] 1 All E.R. 1057 the Court of Appeal has said that since 1925 either parent has an equal claim to decide the religion in which the children are to be reared. Although a pre-marital agreement, such as the Catholic Church always requires before it sanctions a mixed marriage, does not in itself entail the surrender of this equal claim, acquiescence may have that effect, as may also moral unfitness. In the present case a Catholic father and a Protestant mother were both dead, and a dispute arose over the custody of their son, aged six and a half, to which the grandparents on either side laid claim. The court took into account the wishes of the father, the terms of a pre-marital agreement and the fact that the child had been baptised by a Catholic priest; but the paramount consideration, which was decisive, was the welfare of the infant himself. It was held accordingly that he should stay in the Protestant home where he had lived for the past two years.

It is worth noticing that the court in fact decided the case on a technical point. The judgment should therefore be read in the light of the very careful judgment of Slessor L.J. in *Re Carroll* [1931] 1 K.B. 317, which is the *locus classicus* of this part of the law.

D. C. POTTER.

DEPENDENT LIMITATIONS FOLLOWING A LIMITATION VOID FOR PERPETUITY

Re Mill's Declaration of Trust [1950] 1 All E. R. 789 confirms, if it does not further clarify, a well-known rule of property law. If a limitation offends against the Rule against Perpetuities it drags down with it all subsequent limitations which were meant to wait upon the determination of the prior void limitation. In some cases it is not easy to decide whether the subsequent limitation was intended to follow the prior limitation in series or was an independent limitation springing up without reference to the fate of the prior limitation. In the instant case there was less difficulty, since the gift over specifically incorporated the condition which had made the prior limitation too remote. Once this construction was accepted it necessarily failed with it. Indeed it might be better to say that the subsequent limitation was itself conditional in terms and too remote, the prior limitation only being important as providing the details of the void condition. The first clause of importance in the document referred to the possibility of a childless daughter leaving children who should survive the survivor of the daughter and the settlor's wife and attain the age of 21. The vesting of an interest in such children was valid. The wife and daughter were lives in being, and so the survivor must be a life in

being. On the death of the survivor any grandchild must be in being, her mother being dead, and the 21-year period of infancy would come within the perpetuity period. But the settlor did not stop here. He gave such grandchildren a mere life interest, and limited the remainder to the issue of such grandchildren who should attain the age of 21. This last gift was too remote, as its vesting could not be linked to any life in being and might well occur more than 21 years after the dropping of all lives in being expressed or implied in the document. In a further clause certain named persons, already in existence, were to take the property if the daughter died without leaving issue who attained a vested interest. It was held that this meant, 'attaining a vested interest under the prior clause', and incorporated by reference the remote limitation to issue of grandchildren. The gift in the further clause therefore failed although in the event the daughter died, without having had a child, a few years after the settlor. The settlor meant the trustees to wait until issue of the grandchildren, say, attained the age of 20 but then died under 21, before the named persons should benefit. This the law will not permit. Nor will it accelerate the contingent gift to the named persons and contradict the settlor by giving them the property discharged from the condition. *Romer J.* followed the older cases of *Monypenny v. Dering* (1852) 2 De G.M. & G. 145, and *Beard v. Westcott* (1813) 5 Taunt. 393, in pointing out that 'In my judgment the gift over is expectant on the failure of a class which the settlor intended to benefit, but which, had it come into being, would have been precluded by law from taking'. In fact there was no danger of perpetuity as things turned out, but the law looks at the possibilities when the instrument first comes into effect.

A. K. R. KIRALFY.

MEASURE OF DAMAGES IN FATAL ACCIDENTS

THE case of *Bishop v. Cunard White Star, Ltd., Appleby v. Same (The Queen Mary)* [1950] 2 All E.R. 22, is a noteworthy contribution to the long line of cases relating to the liability for fatal accidents. *Hodson J.* was asked to give rulings on many doubtful points arising in the assessment of claims made by the dependants of those who lost their lives when *H.M.S. Curacoa* sank in October, 1942, following a collision with the liner *Queen Mary*. Three hundred persons lost their lives in this tragic accident. The claims of only two families were before the court, but counsel stated that 'the two cases were the forerunners of a large number of similar cases arising out of the same accident, and that guiding rules were sought'.¹

¹ This statement is quoted from [1950] W. N. 185, at p. 186. Similar statements differently phrased are to be found in the All England Reports, *loc. cit.*, at p. 24, and in 66 T.L.R. 828 at p. 829.

The two cases selected for the attention of the court were at opposite ends of the pole as regards the age of the deceased persons and the actual pecuniary loss to the respective families resulting from their death.² The deceased Bishop was a chief petty officer aged thirty-nine, who left a wife and infant child. He had twenty-two years' naval service to his credit, and would have been entitled to a pension at forty. The deceased Appleby was an ordinary seaman aged nineteen and a half and unmarried, whose parents were getting on in years. They were not dependent upon the deceased at the time of his death, but claimed that they relied upon his assurance to help them financially in their old age.

The House of Lords had already determined the proportions in which the two vessels were in fault. The defendants having admitted liability in the present claims, the matter had been referred to the registrar under Order 56 for him to assess the damages. The court was now hearing two motions in objection to the registrar's reports. Hodson J. in his judgment, did not indulge in any exhaustive review of the law relating to the assessment of damages in fatal accidents, presumably because so much of the ground covered is settled law; few authorities are cited, and those which are cited are not discussed in detail. The judgment does, however, contain a useful summary of the law, and examples of its application to complicated sets of facts, together with an extension of some of the existing principles and a clarification of others.

A preliminary point was raised as to whether the court was in fact able to review the registrar's decisions as to damages. Hodson J. thought that there was really no room for argument about this matter, for it was already established, as a result of the decision of the Court of Appeal in *Cooper v. Cooper* [1936] 2 All E.R. 542, which was approved by the House of Lords in *Evans v. Bartlam* [1937] 2 All E.R. 646, that the substantial discretion is that of the judge. He did point out however that, according to established practice, the judge need not feel compelled to form an independent view on questions of quantum but may rely upon the skill and experience of the registrar.³

The claims in the two cases under consideration fell into four heads, as follows:—

² In this respect, there is some similarity to the case of *Davies v. Powell Duffryn Associated Collieries, Ltd.* [1942] 1 All E.R. 657, H.L., where the respective ages of the two deceased persons were forty-two and twenty-three.

There is a further interesting parallel. The facts of the case under review bear a marked resemblance to the case of *Baker v. Dalglish S.S. Co.* [1922] 1 K.B. 361. In that case also a naval vessel was sunk as the result of a collision with a merchant ship during wartime, and the action was brought as a test action.

³ Lord Atkin, in the latter case, at p. 649, explains that the judge is entitled to exercise the discretion, 'as though the matter came before him for the first time. He will, of course, give the weight it deserves to the previous decision of the Master, but he is in no way bound by it'.

(1) *Claims under the Law Reform Act, 1934, for damages for loss of expectation of life.*

The decision of the House of Lords in *Benham v. Gambling* [1941] 1 All E.R. 7, relieved the courts of a large number of the difficulties which they had encountered since *Rose v. Ford* [1937] 3 All E.R. 359, H.L., in 'attempting to equate incommensurables'⁴ with regard to loss of expectation of life. Now Hodson J. has drawn from the *Benham v. Gambling* case the conclusion that 'where men in the prime of life are concerned (as in all the claims arising from this accident), the measure of damages does not vary with the number of years of the allotted span which may be said to lie in front of the deceased persons', although there was here present a considerable difference in ages, as has already been pointed out. Perhaps the most succinct formulation of the idea underlying this approach is to be found in the words of the registrar which were approved by Langton J. in the *Aizkarai Mendi* [1938] 3 All E.R. 483, at p. 487. He is reported to have said that he made no differentiation according to the different ages of the men in question, because 'the joy they get out of (life) is much the same whether they find it in what they have done or in the hope of what they may do'.

(2) *Claims for damages for pain and suffering.*

These failed because there was no clear evidence of reasonably prolonged suffering, and Hodson J. considered that it would be difficult if not impossible to ascertain the circumstances in which these men met their deaths and the length of time each survived the collision. The learned judge here followed the view expressed by the Court of Appeal in *Rose v. Ford* [1936] 1 K.B. 90, which was approved by the House of Lords in the same case, [1937] 3 All E.R. 359.

(3) *Claims for damages in respect of loss of personal property.*

These were accepted by the registrar, subject to slight reductions, and Hodson J. agreed with the course he had taken in this respect.

(4) *Claims for damages under the Fatal Accidents Acts.*

This was the head which provided the most difficulty. The method of calculating the sum to be awarded is admirably described by Lord Wright in *Davies v. Powell Duffryn Associated Collieries, Ltd.* [1942] 1 All E.R. 657, at p. 665. Hodson J. adopted this method, quoting Lord Wright as follows: 'The starting point is the amount of wages which the deceased was earning, the ascertainment of which to some extent may depend on the regularity of his employment. Then there is an estimate of how much was required for his

⁴ Viscount Simon's apt phrase, in the *Benham v. Gambling* judgment at p. 13.

own personal and living expenses. The balance will give a datum or basic figure which will generally be turned into a lump sum by taking a certain number of years' purchase. That sum, however, has to be taxed down by having due regard to uncertainties, for instance, that the widow might have again married and thus ceased to be dependent, and other like matters of speculation and doubt'. In addition, one must note that from the resulting total certain deductions must be made in respect of pecuniary advantages received by the dependants in consequence of the death.

In the application of this method to the two claims in the case under review, Hodson J. had to give answers to three difficult questions :

(1) Should the number of years' purchase be reduced by reason of the hazardous nature of the occupation of the deceased men? Langton J. in 1938 in the *Aizkarai Mendi* (*loc. cit supra*) had greatly reduced the amount of the award to the dependants of seamen 'upon the view that all the men in question were engaged upon a dangerous trade'. Oliver J. in *Hall v. Wilson* [1939] 4 All E.R. 85, a case decided after the outbreak of the Second World War, where the deceased had been killed shortly before that event, held that 'it is proper to take into account the possibility of the man being killed in the war, as a member of the fighting forces if he is of military age, or as a result of air raids'. Since then we have all had enough experience of modern warfare to realise that it is impossible to arrive at a nice calculation of relative hazards, by comparing dangers at sea with those on land and so forth, and the judges have had to recognise the impossibility. Just as the definition of 'actual military service' in relation to soldiers' privileged wills has been extended,⁵ so now we find Hodson J. in the present case declaring that the number of years' purchase should not be materially reduced by reason of the hazardous nature of the occupation of the deceased men. That does not mean that in calculating the starting sum the civilian prospects of the deceased should not be given due weight on the credit side of the calculation. The learned judge considered that in the case of Bishop, who was a highly skilled craftsman within a year of pensionable age, with good prospects when he left the Navy, such prospects were rightly taken into account.

(2) In respect of what items ought deductions to be made from the total figure arrived at in this way, and should such deductions be made in full, pound for pound?

The determination of the proper sum to deduct in the case of benefits accruing to the dependants in consequence of the death has more than once troubled the courts. Lord Watson wrestled with the difficulty in *Grand Trunk Railway of Canada v. Jennings* (1888) App.Cas. 800, P.C., and more recently Humphreys J. in *Roughead*

⁵ *Re Wingham* [1948] 2 All E.R. 908.

v. *Railway Executive* (1949) 65 T.L.R. 435, gave it as his opinion that 'it is a grisly way of looking at things to say that a widow benefits by her husband's premature death because she receives what he proposed to leave her . . . earlier than she would otherwise have done. Nor am I in the least satisfied that it is a universal rule which could possibly be applied to all cases'. It may be that Hodson J., by indicating that not all pecuniary benefits need be deducted in full, has shown one direction in which the rule can be mitigated in favour of the deceased's family.

It has been decided that sums awarded under the Law Reform Act for loss of expectation of life must be deducted from damages awarded under the Fatal Accidents Acts. As these are essentially inexact sums to begin with, Hodson J. ruled that the deduction should be in full, pound for pound. Nothing was awarded for pain and suffering, as we have already mentioned (head 2, *supra*), but it would seem to follow that had damages been awarded under this head, full deduction would have been made. With regard to damages for loss of personal effects, Hodson J. held that it by no means follows that deductions should be made on a pound for pound basis. If the estate consists in the main of a house and furniture of which the widow claimant continues to enjoy the use after the death as before, there is no pecuniary benefit to the widow resulting from the death, and therefore the learned judge considered that in such a case no deduction should be made. The same applies to articles of which a widow would have had the use when her husband was at home. The result of this ruling is to increase the total sum which the widow receives under the Fatal Accidents Acts by eliminating certain deductions which might otherwise be made.

It was already established that where stocks and shares and comparable income-producing investments are concerned, and the probable family interest is accelerated by the death, the deduction will normally be made in full.⁶ Also statutes provide that no deduction shall be made in respect of sums received under policies of insurance, nor in respect of State insurance benefits or allowances. But deductions must be made in respect of the rights of a widow and children to pensions.⁷

(3) What is the effect of delay in assessing damages, where the circumstances have changed in the meantime?

There is no doubt that damages are to be regarded as having crystallised at the date of the death. The result is that the devaluation of the pound between the date of the death and the date of the award cannot generally be taken into account. The judges have the

⁶ *Pym v. G.W.R.* (1863) 4 B. & S. 396; and see Clerk & Lindsell on *Torts*, 10th ed., 1947, at p. 92.

⁷ *Baker v. Dalgleish S.S. Co.*, *loc. cit.*, *supra*, note 2. As Scrutton L.J. said in that case, at p. 372, 'Just as in assessing the loss by the death the probability of voluntary contribution destroyed by the death of the contributor may be included to swell the claim, so the probability of voluntary contribution bestowed in consequence of the death may be used to reduce the claim'.

unenviable task of thinking themselves back to the time of the event, and are not able to make direct adjustments in order to take into account the rise in the cost of living since that time.⁸ Indirectly, however, it appears that they can make allowances in two ways. Firstly, they can raise the number of years' purchase of the starting sum. This has usually been ten or twelve years, but in *Roughhead v. Railway Executive* (*loc. cit. supra*), the period was raised to fifteen years on account of the rather exceptional prospects of the deceased person. In the present case, the registrar took fifteen years' purchase in the claim re the deceased Bishop, though it does not appear what period was taken in the claim re the deceased Appleby. It seems that he made allowances for the fall in the value of money between the date of the death and the date of the award, *i.e.*, between 1942 and 1950.⁹ Hodson J. did not disturb the starting sum thus arrived at in *Bishop's Case*, though in regard to deduction of pension benefits from that sum he took twelve years as the basis of his calculation. The starting sum was greatly reduced in *Appleby's Case* because of the limited nature of the dependency. Secondly, increases of pensions granted to meet the increased cost of living need not be brought into account. In calculating the sum to deduct, the judges can ignore such increases. As we have seen, pensions are regarded as benefits which must be deducted from the starting sum. Although damages are to be assessed as at the date of the death, Hodson J. explained that this does not mean that one must disregard anything that has happened in the meantime by way of payment of pensions or other sums of a like nature, for 'what was then uncertainty has now been turned into certainty, in so far as money has been received by claimants'. The learned judge held, however, that where pension rates have been raised since the time of the death to meet the increased cost of living, such increases are not properly deductible pound for pound from the total award. But against this concession must be set the ruling that the limit of deduction is not the amount of pension actually received at the date of the award, for 'where the number of years' purchase taken into account in arriving at the starting sum is greater than the

⁸ There are two periods at which the effect of the rise in the cost of living is relevant. The value of the pound ought to be considered (i) as at the date of the death, *i.e.*, in this case 1942, and (ii) as at the date of the award, *i.e.*, in this case 1950. Even if no account can be taken of the difference in value between (i) and (ii), because of the rule that damage is to be assessed as at the date of the death, allowances ought to be made for the value of the pound at (i). See *Hart v. Griffiths Jones* [1948] 2 All E.R. 729, where Streatfeild J., in assessing damages for loss of expectation of life, made 'some addition . . . in respect of the alteration in the value of the £'. However, the assessment of damages is never a very scientific matter. The inability to take account of the difference between the value of the pound at (i) and at (ii) may be partially overcome by the means indicated in the text and adopted by the registrar and Hodson J.

⁹ See 100 Law Jo. pp. 312 and 327, article on 'Assessment of Damages in Fatal Accidents', especially at p. 313.

number of years in respect of which pension has been paid', deduction should be made for the period of the difference. This means that deduction is to be made in respect of pension prospectively receivable as well as in respect of pension actually received.

This recognition of facts subsequent to the death in the assessment of the sum to be awarded is consistent with the attitude adopted by the Court of Appeal in *Williamson v. Thornycroft & Co., Ltd.* [1940] 4 All E.R. 61. In that case, du Parcq L.J. said that 'in one sense, it may be true to say that the moment at which one fixes the damages, whether in the ordinary case of tort or in a case under Lord Campbell's Act, is the moment of death. However, that does not mean that one should shut one's eyes to everything that has happened subsequently'. As Uthwatt J. said in *Re Bradberry* [1942] 2 All E.R. 631, at p. 635, a case concerning the valuation of annuities, 'Why should the court neglect known facts and put itself in the position of a prophet who, when he knows all the facts, projects himself to an earlier date and predicts as the span of life of a person known to be dead the length of life of the hypothetical person who lives his actuarial life? Few would trouble to acquire the mantle of Elijah to make such a prophecy. In my view, one who did so would only be wasting his (clothing) coupons'.¹⁰

It remains to note that when all the necessary deductions have been made, Hodson J. accepted the practice adopted by the Court of Appeal in *Johnson v. Hill* [1945] 2 All E.R. 272, of apportioning the resulting total among the family, taking the family as a unit where claims are made in respect of more than one dependant. In the case of Bishop, the original award of £2,502 was reduced to £2,315, mainly because of the deduction of pension benefits prospectively receivable. In the case of Appleby, the starting sum was substantially reduced because of the limited dependency, and, after the appropriate deductions had been made, the final award came to £61 instead of £711.

J. E. HALL WILLIAMS.

FOREIGNERS AND ENGLISH PUBLIC POLICY

It is elementary law that supervening illegality ordinarily serves to abrogate a contract and that a contract so dissolved is gone beyond recall. Thus in *Esposito v. Bowden* (1855) 4 E. & B. 963, where it was argued that a charterparty (performance of which had been rendered illegal on the outbreak of the Crimean War) had been cured of its illegality by a British proclamation made some days after the outbreak of war, Lord Campbell had no difficulty in finding a logically unassailable answer. If the proclamation, he pointed out, had been 'contemporaneous with the declaration of war, it might

¹⁰ See also du Parcq J. in *Smith v. Cawdle Fen Commissioners* [1938] 4 All E.R. 64, and Evershed J. in *Re North Settled Estates* [1946] 1 Ch. 13.

have been material : but it could have no operation to prevent the alleged dissolution of the contract ; and the contract, once dissolved, could not be reintegrated '.

If this reasoning be sound, one aspect of the decision in *O/Y Wasa S.S. Co. and N.V. Stoomschip 'Hannah' v. Newspaper Pulp and Wood Export Ltd.*, 82 Ll.L.R. 936, is at first sight rather startling, since Morris J. would appear (as one limb of an alternative ratio) to have decided the illegality point there raised upon the footing that an illegal taint is susceptible of subsequent cure. The defence of illegality was pleaded against a shipowners' claim for damages for failure to load. The defendant charterers (a Swiss company) alleged that, prior to the date of breach, the plaintiffs (a Finnish company) had become affected with enemy status in that the Dutch company which (as was alleged) controlled the Finnish company had itself become enemy-tainted upon the German occupation of the Netherlands. Morris J. very much doubted whether the Finnish company did ever in fact become tainted (being of opinion that the necessary degree of Dutch control had not been established), but he declined to decide the case positively on that footing and (at p. 962) held that any taint which might have attached to the plaintiffs was 'entirely removed' by a decree of the Dutch Government in London, the effect of which was (as the judge found) to divest the Dutch company of its controlling interest in the Finnish company. Accordingly, the contract being 'cured' by the date of the breach, Morris J. held that the defence of illegality did not avail.

The material point to note is the date of the Dutch decree. It was made *after* the taint (if any) had attached to the Finnish plaintiffs. How, it may be asked, could the Dutch decree in the *Wasa Case* be effective to cure the illegality, when the proclamation in *Esposito v. Bowden*, *supra*, was ineffective?

In *Esposito v. Bowden* one of the contracting parties was a British subject : in the *Wasa Case* neither was. It seems that this at first sight slender distinction may supply the answer to the question just posed. In the *Wasa Case* Morris J. was pressed with the argument that abrogation takes place only where the contract by its terms commits a contracting party who is a *British subject* to conduct offending against English public policy. Dealing with this submission, the judge (at p. 960) said : "While this view may be correct, and while the English court may not be concerned to lay down that contracts between a neutral and an enemy are abrogated, nevertheless, in my judgment, the English courts would not lend their assistance to the enforcement of a contract or to the awarding of damages for its breach if it was part of the policy of England to prevent the performance of such contract". It must be conceded that in this passage the learned judge stops a long way short of laying down in terms that, in such case, an English court will merely regard the contract as 'unenforceable'. Nevertheless the fact that

the charterparty in the *Wasa Case* involved no British subject in illegal conduct and so rendered the contract merely 'unenforceable' (and hence capable of cure) seems at any rate a possible explanation of Morris J.'s finding that the taint was 'entirely removed' by the date of the breach, and the contract thereby cured.

Judgment in this difficult case had (for reasons indicated in the report) to be delivered unreserved and it cannot be asserted that the explanation of the *ratio decidendi* hazarded above is necessarily correct. If, however, it be the true explanation, it is submitted that the case draws a novel distinction in the sphere of public policy. It would seem that where foreigners contract in a manner offensive to English policy their contract is to be regarded simply as 'unenforceable' in the English courts. Such a distinction, as the *Wasa Case* itself shows, may not always be devoid of practical significance.

B. E.

ISSUE OF BILL OF LADING. CAUSATION

IN *Heskell v. Continental Express Ltd. and Another* [1950] 1 All E.R. 1033 the circumstances involved a very rare convergence of coincidences. Briefly, the facts were that an English exporter agreed to sell a quantity of cloth to a Persian importer. At the request of the British Treasury the exporter sold at only a normal profit and refrained from participating in the highly inflated profit available to the importer in Teheran. Under the terms of sale the vendor undertook to ship the goods, procure the shipping documents and send them off to the purchaser in the usual way.¹ Towards the end of 1946, vendor obtained an allocation of shipping space from the second defendant who was acting as loading broker on behalf of the shipowner. Thereupon, vendor gave instructions to the first defendant carrier, who was warehousing the cloth, to dispatch it to the dockside. The carrier negligently failed to dispatch the cloth and furthermore, negligently failed to notify vendor of his failure to carry out instructions. Meanwhile, vendor sent the necessary documents, including a draft bill of lading, to the broker who negligently issued, in respect of the undelivered cloth, a shipped bill of lading signed by himself which vendor duly sent off to purchaser. On non-delivery, purchaser sued and obtained from vendor heavy damages in respect of loss of profit in the Persian market. Vendor now claimed damages alternatively from the broker and the carrier: from the broker on three grounds: (i) breach of contract in issuing a false bill of lading; (ii) breach of a general duty of care in issuing a false bill of lading; (iii) breach of implied warranty of authority in that by professing to

¹ The short examination by Devlin J. whether the contract of sale was c.i.f. is not here noted, owing to pressure of space.

have authority to sign the bill he induced the plaintiff to act upon that profession in a matter of business and to his detriment. From the carrier vendor claimed two main heads of damages on the alternative grounds of: (i) detinue; and (ii) breach of contract of bailment. Devlin J. examined the large number of points that arose in a considered, lengthy and closely reasoned judgment.

Two preliminary but interesting points deserve prior discussion. Devlin J. suggested that the Persian importer might alternatively have sued the shipowner for non-delivery because the latter would have been prevented from alleging non-shipment through the conclusive character of the bill under the Bills of Lading Act, 1855, s. 3 (at 1044). But under section 3, the bill is conclusive evidence only against 'the master or all persons signing the same'. As the practice of loading brokers does not appear to differ in the relevant matters to-day from that in 1867, *Jessel v. Bath*, L.R. 2 Ex. 267 is strong authority for saying that the broker's signature is not the owner's for the purposes of section 3 and that consequently, an action by importer against owner would have foundered on owner's proof of non-shipment. Devlin J.'s suggestion seems to stand in line with the wording adopted by Brett J. in *Brown v. Powell Coal Co.* (1875) L.R. 10 C.P. 562, 568.

A further suggestion was made by Devlin J.: 'When the plaintiff discharged his liability to [the importer] he might, I suppose, have taken the benefit of [the importer's] right of action against the shipowner' (at 1044). It is, however, open to strong doubt how this might legally have been effected: not by re-indorsing the bill to the vendor on settlement of purchaser's claim, for section 3 would not apply (*inter alia*) where 'such holder of the bill of lading shall have had actual notice at the time of receiving the same that the goods had not been in fact laden on board'. Nor surely might the result have been achieved by assignment to vendor of the right of action for damages against the shipowner, since an assignment of a bare right to litigate unconnected with any transfer of property 'savours of maintenance' and is void. But these, however interesting, were only by-points.

The first claim against the broker was defeated through the absence of any contractual relationship between vendor and broker, the engagement of cargo-space being assumed to be non-contractual (at 1041), though it would have made no difference had it been considered contractual. The learned judge rejected the rather far-fetched argument that the delivery of the draft bill to the broker made the latter, through his custody of the bill, an agent of the vendor-shipper.

The second ground, raising a new point in shipping law, foundered at the outset on the rule in *Le Lievre v. Gould* [1893] 1 Q.B. 491, for the issue of the bill, assuming it 'caused' the loss suffered by the vendor, amounted to a negligent misstatement and consequently founded no liability initially. But the additional

reasons given by Devlin J. in denying the existence of a general duty of care are open to some criticism. The reasons were based on a comparison between the bill of lading and the bill of exchange : as no duty lies on drawer or acceptor to exercise care in drawing or accepting a bill of exchange, similarly a shipowner or his broker are under no such duty in issuing a bill of lading. As a technical analogy, this line of reasoning, with great respect, breaks down on examining the different natures of the duties urged respectively in the cases of bills of exchange and of lading. In the former case there is no duty (apart from the special relationship of banker and customer) so to draw or accept a bill as to prevent a third party from causing loss by fraud to an ultimate holder. The careless issue of a bill of lading is by itself likely to cause loss. While it may be overharsh and unjust to impose on the drawer or acceptor of a negotiable instrument the obligation of being his unknown brother's keeper, no equal hardship or injustice is inflicted by requiring the issuer of a bill of lading to take care not to cause damage directly by his own act. A second point of analogy was that 'if the shipowner can prove that the goods have not been shipped, his promise may not bind him as against the shipper; but that is hardly saying more than that the drawer of a cheque will not be liable to the drawee if he can prove no consideration. In both cases the makers of the document will be liable to indorsees' (at 1045). The exact force of this argument is not entirely clear; it seems to amount to no more than that if no action in contract exists against the shipowner, the action in tort is also blocked. Finally, Devlin J. examined counsel's argument that it would be a grave matter if brokers could issue with impunity worthless bills of lading which would thereafter circulate as documents of title and be relied on as such in the mercantile world (at 1045). The main drift of the learned judge's remarks appears to have been that the danger counsel painted was overcoloured, that normally a 'shadow' bill of lading does not slip through the carefully devised routine of shipping firms and, consequently, as this was purely a marginal case there was no need to create the duty of care sought. But, many commercial rules have been developed only for marginal cases, for the 'pathology of business', and a marginal case or not, the bill of lading is of such pivotal importance in overseas commerce that it is, with great respect, strongly arguable that a duty of care in its issue ought to exist, provided of course the rule in *Le Lievre v. Gould* might be overcome.

The third claim against the broker also failed. The broker had indeed signed the bill without authority, as the goods were not shipped, but the only damages claimable would be what the plaintiff had suffered from not being able to sue the shipowner (at 1043), or, less ambiguously, from having a bill signed without authority. Here, the well-established but infrequently invoked rule that the bill of lading merely evidences the contract of carriage

and is not itself the contract became of crucial importance. For though a bill had been issued there was no contract between shipper and shipowner by reason of the non-delivery of the goods to the shipowner's servants, the moment at which the contract of carriage would have been concluded. Consequently, whether the broker's signature had been authorised or not was strictly irrelevant since the chance of suing the shipowner depended first on the independent creation of a contract, which the negligence of the shipper's carrier had prevented. The secondary argument from the doctrine of estoppel, too, was rejected. It was not open to the plaintiff to allege an estoppel, since no preliminary duty of care had been established; and even if shipowners were estopped from denying the lack of a contract, it was not further open to the plaintiff to allege a breach of the estoppel-created contract by mixing 'fact and fiction in the proportions which suit [the plaintiff] best' (1044).

The action against the carrier in detinue failed *in limine*, for there had been no demand or wrongful refusal. The carrier was, however, in breach of the contract of bailment not only because he did not deliver by the agreed date to the shipowner's servants at their loading shed, but also because he had failed thereafter to inform the plaintiff of his neglect until February, 1948, after the lapse of some fifteen months. During this period the market value of the goods at the place of delivery dropped. This difference (together with two small allowable sums) represented the reasonably foreseeable damages, the ordinary measure of damage for delay in delivery by a carrier. It did not in fact constitute the actual loss suffered for vendor sold the goods much later than February, 1948, and at a higher price when he finally obtained a licence to sell in the home market. But 'the appreciation or depreciation of the goods after February, 1948, was his own affair' (1046).

These normal damages were contested on the ground that they did not result from the breach of bailment. It was argued that the chain of causation had been severed by a *novus actus interveniens* in the shape of the negligent issue of the bill, that is, but for the negligence in issuing the bill the injurious results of the carrier's negligence would have been avoided. Had the breach of bailment ceased after the date of delivery, it would have been difficult to argue that any loss incurred by that date was caused, in the legal sense, by the breach, *viz.*, was reasonably foreseeable by the parties at the date of contract. As already indicated, Devlin J. held that the breach continued up to February, 1948. Under these circumstances, the drop in value consequent on the delay caused by the continuing breach of bailment might legitimately be said to have been reasonably foreseeable, the negligent issue of the bill having ceased to be an operative factor. Devlin, J., however, went on to consider counsel's second argument that 'whatever might have been foreseen, the issue of the bill of lading intervened and was in

fact the dominant cause of the delay after [the date of delivery] (1046)'. Devlin J. rejected this argument, but it is difficult to understand why the argument was considered at all. The test of legal causation in the general law of contract is that of reasonable foresight: once consequences are reasonably foreseeable, *ipso facto* such consequences are legally caused by the breach in question, whether or not it be a case of *novus actus interveniens*. It is submitted that there is a danger in arguing, as Devlin J. did, from parallel branches of law, like tort, insurance or pensions, because each branch is informed by different policies and purposes.

In the course of this part of his judgment, Devlin J. stated two propositions of law concerning remoteness that deserve to be afforded a more prolonged consideration: (i) 'Where the wrong is a tort, it is clearly settled that the wrongdoer cannot excuse himself by pointing to another cause. It is enough that the tort should be a cause and it is unnecessary to evaluate competing causes and ascertain which of them is dominant' (at 1047). The cases go to show, however, that, where there are competing causes in a case of tort, it is not enough that the tort at issue should have been a cause of the loss. The rules of remoteness in tort are, in this connection, much more complex, and this complexity was fully recognised by Denning L.J., who as judge of first instance in the *Chenell Case* [1946] 2 All E.R. 721, said, in my respectful opinion, nothing to support the unqualified and over-simple statement of law made by Devlin J.

(ii) 'Whatever the true rule of causation may be I am satisfied that if a breach of contract is one of two causes, both co-operating and both of equal efficacy, as I find in this case, it is sufficient to carry judgment for damages' (at 1048). It is submitted, with great respect, that the legal rule contained in the passage cited is not supportable by authority in the general law of contract; nor did the insurance case of *Reischer v. Borwick* [1894] 2 Q.B. 548, in my respectful submission, lay down so clear-cut and definite a rule as that 'for the purposes of a contract of insurance it is sufficient if an insured event is, in this sense, a co-operating cause of the loss' (at 1048).

A final matter with regard to this first head of damages: the argument was advanced that for the purposes of assessing the drop in value caused by the breach of bailment, the place of delivery to be taken was not the dockside in England, but Teheran. Devlin J. indulged this argument so far as to point out that no satisfactory evidence of the market position in Teheran at the relevant time had been proffered. With regard to 'normal and probable consequences', the place of delivery must be that agreed on in the contract of carriage in question. It is, therefore, improbable that this rather strained argument can in future aid the plaintiff who does proffer full evidence of the overseas market conditions.

The second head of damages involved the very rare case of a

claim for the damages paid by the plaintiff to a sub-purchaser. Such damages are not 'normal and probable' in the case of a carrier and are only recoverable provided the carrier receives at the time of contract some communication of the special loss his failure to deliver is likely to cause. The Court of Appeal judgment in the *Victoria Laundry Case* [1949] 2 K.B. 528, usefully reformulated the rules in *Hadley v. Baxendale*, 9 Ex. 341, but made no changes in the law. This fact was underlined by Devlin J. who appropriately stressed that the rules of remoteness in contract, however formulated, must still be read in the light of the large body of case-law laid down in the books over the past one hundred years. It will not avail counsel to gamble on the widely-embracing literal sense of the 'on the cards' phrase of Asquith L.J. Such phrases as these can only be rough approximations. The necessary fine adjustment of principle to individual facts has to be achieved through the mediation of detailed precedent and judicial discretion. In the present case, the necessary knowledge had not been communicated directly or indirectly and the leading case of *Horne v. Midland Ry.* (1873) L.R. 8 C.P. 181 completed the downfall of the claim.

In spite of the foregoing criticisms, it is impossible to quarrel with the final result of *Heskell* on purely technical grounds. It should be added that Devlin J.'s judgment is particularly noteworthy for the valuable description given at pp. 1037-9 of the practice followed in shipping cargo and issuing bills of lading.

C. GRUNFELD.

MENS REA AND RECEIVING STOLEN GOODS

IN *R. v. Matthews* (1950) 34 Cr.App.R. 55, the Court of Criminal Appeal decided that someone who received goods, knowing them to have been stolen, with the intention of handing them over to the police at once, was not guilty of felony, under section 38 of the Larceny Act, 1916, although he subsequently changed his mind, and hid the property in question behind the seat of the police car in which he was being conveyed. The court laid it down in general terms that, 'If at the time when the property is received the receipt is innocent, the fact that the receiver changes his mind and later misappropriates the property does not turn the receipt into a felony' (at p. 58, *per* Lord Goddard C.J.). The case thus raises the problem of mens rea, in relation to the crime of receiving stolen goods, in a somewhat novel form.

Hitherto, attention has been mainly directed to the adjectival question of the proof of guilty knowledge on the part of the accused (Larceny Act, 1916, s. 43; *R. v. Abramovitch* (1915) 84 L.J.K.B. 396); although it was decided, as a matter of substantive law, in *R. v. Johnson* (1911) 6 Cr.App.R. 218, that such knowledge must have existed when the goods were received. Hence, 'The innocent

receipt of a chattel, and a subsequent dishonest appropriation of it, after knowledge that it has been stolen, do not constitute the crime of receiving, unless something takes place after the guilty knowledge, which can be regarded either as a fresh act of receiving, or as completing the original receiving, if the latter was in fact incomplete at the time' (6 Cr.App.R. at p. 219, *per* Bray J.).

In *R. v. Johnson* the purchaser of goods who did not know that they were stolen when he received them, refused to part with them after he had been made aware of that fact and succeeded on his appeal. In the instant case, there was no doubt that the accused received property 'knowing the same to have been stolen', and thus came precisely within the express terms of section 33 of the Larceny Act, 1916. Therefore, the first respect in which the decision is of interest, is that it is an apt illustration of the necessity of implying mens rea, in the sense of criminal intent, in the definition of the more serious statutory offences. It would be repugnant to common sense to hold that everyone who knowingly receives stolen property is guilty of felony. If that were the law, a person who actually carried out the laudable purpose of handing the property over to the police would be liable to conviction.

As long ago as the reign of Elizabeth, it was decided that, in some cases, it is lawful to receive goods, knowing them to have been stolen (Yelv. 5). In those days, receiving was merely a common law misdemeanour, but the principle that the legislature cannot be presumed to have intended to vary the common law requirement as to mens rea, when creating the statutory felony, might have been called in aid of the construction placed upon section 33 of the Larceny Act, 1916, in *R. v. Matthews*.

The second respect in which this case is of interest, is that it prompts questions as to the precise nature of the mens rea required to constitute the offence of receiving stolen property, which may have to be considered by the courts in the future. Granted that it is not sufficient for the accused to have known that the goods were stolen when he received them, what further mental state must have existed at that time in order that the receipt may be criminal? *R. v. Richardson* (1834) 6 C. & P. 335 decided that a person who knowingly receives stolen property for the mere purpose of concealment without deriving any profits at all, is just as much a guilty receiver as if he had purchased it. In this respect the law of larceny is analogous (*R. v. Cabbage* (1815) R. & R. 292), but the question arises as to whether the analogy is apposite in other respects so far as mens rea is concerned. Is a person who knowingly acquires stolen property under a claim of right, based on a mistake of law, guilty of receiving (cf. as to larceny, *R. v. Bernhard* [1938] 2 K.B. 264), and, in order that he may be guilty of receiving, must the accused have intended to deprive the owner permanently of his chattel (cf. as to larceny, *R. v. Crump* (1825) 1 C. & P. 658)?

For example, if A buys goods from B, knowing them to have been stolen, but believing that B can confer a good title, is A guilty of felony under section 33 of the Larceny Act, 1916? Again, if A receives B's chattel with knowledge that it has been stolen, but intending to return it to B after using it, is A guilty of feloniously receiving stolen property? *R. v. Smith* (1855) Dears. 494 suggests that a person who knowingly receives stolen goods, with the intention of seeking a reward for their restitution, is guilty of the felony of receiving, but this point was not argued, and there does not appear to be any other relevant decision. The judgment in *R. v. Matthews* does not provide an answer to questions such as those which have been put, because the court had to act on the assumption that, when he received the goods, the appellant intended to hand them over to the police *at once*.

The third respect in which the case is of interest is that the judgment makes it plain that the conduct of the accused did not amount to larceny, even if he intended to conceal the goods permanently when he hid them. *R. v. Riley* (1853) Dears. 149 and *Ruse v. Read* [1949] 1 K.B. 477, in each of which there was a trespass,¹ were distinguished, for 'If the jury had believed the appellant's evidence, that he had innocently taken the property in the sense that he intended to return it to the true owner or the police, there would be no trespass, and therefore he could not be guilty of the offence of stealing' (34 Cr.App.R. at p. 59, *per* Lord Goddard C.J.).

The correctness of this conclusion is no doubt incontrovertible, so far as the existing law is concerned. Nevertheless, it is a striking illustration of the inadequacy of the current definition of larceny, with its outmoded insistence on the necessity of a trespass, in cases other than that of larceny by a bailee. From the moral point of view, what possible difference can there be between the conduct of one who sells another's lamb, which he has inadvertently led out of a field, or of one who disposes of another's bicycle, which he took when he was too drunk to form any intention with regard to its future, and that of a person who misappropriates stolen goods which he received with the intention of handing them over to the police?

¹ It has been argued that there was no trespass in *R. v. Riley*, the case being, it is said, analogous with that in which an article falls from the counter, into the pocket of a shopper who was unaware that it had done so (*J. Ll. J. Edwards*, in *Current Legal Problems* (1950), 141); but, on the view of the facts taken by the court, Riley performed a positive act in relation to the whitefaced lamb, by driving it out of the field, together with his own twenty-nine lambs. It is submitted that the true analogy is that of a shopper who, having placed three pennies on the counter, finds that they are not required for the purpose of his purchase, and picks them up, together with a fourth penny, which does not belong to him, placing all the coins in his pocket. Surely there would have been a technical trespass, so far as the fourth penny was concerned, notwithstanding the fact that the shopper did not know that he had picked it up. *Riley's Case* is not really one of inevitable accident, but of trespass by mistake, the court taking the view that the lamb did not stray into the accused's flock, but rather that it was inadvertently included in the flock by the accused.

Few would deny the social justice of the decisions in *R. v. Riley* and *Ruse v. Read*, although a lawyer may well doubt the propriety of the inroad which they make upon the time-honoured requirement of the synchronisation of the mens rea and actus reus in the case of larceny. *R. v. Matthews* emphasises the necessity of such synchronisation in the case of receiving. The subsequent conduct of the accused could only be relevant, so far as the latter offence is concerned, if, by analogy with the doctrine of *Riley's Case*, receiving, like trespass, were treated as a continuing act, or if the subsequently formed intention to misappropriate were held to relate back to the original receipt.

These are specious suggestions, and the first was decisively rejected in *R. v. Johnson* (1911) 6 Cr.App.R. 218. The judgment in *R. v. Matthews* lends no countenance to the second, and this, coupled with its insistence on the necessity of mens rea, in a real sense, as an ingredient of a serious statutory offence, is a reason why the decision should be welcomed from the legal point of view.

The question remains whether a person who knowingly receives stolen property, with the intention of handing it over to the police or the owner, is guilty of any crime when he misappropriates it. If the answer is in the negative, our criminal law is defective; but it is difficult to see how an affirmative answer can be given. *R. v. Matthews* shows that, where a person knowingly, but innocently, receives stolen property, he is guilty neither of receiving, nor of theft, if he misappropriates it. The only other possible head of criminal liability appears to be that of fraudulent conversion, contrary to section 20 (1) (iv) (b) of the Larceny Act, 1916, on the ground that the property was received 'for or on account of' another person, namely, the owner. This was not mentioned in *R. v. Matthews*, on the facts of which case it might have been hard to prove a conversion, a matter which would have depended upon the intention of the accused when he hid the goods in question. In any event, the suggestion is highly speculative, as there is a dearth of authority on the precise ambit of section 20 (1) (iv). *R. v. Grubb* [1915] 2 K.B. 683 decides that it is unnecessary that the owner should have known that his property was being entrusted to, or received by the accused, but the facts of that case were very different from those under consideration. It is, to say the least, doubtful whether section 20 (1) (iv) of the Larceny Act, 1916, would be held to apply where the owner had not voluntarily parted with his property to anyone, where the recipient was given no directions as to the destination of the property, and where, at the moment of the receipt, the recipient owed no duty to anyone as to the disposal of the property.²

² It has been said that, on facts such as those of *R. v. Riley* and *Ruse v. Read* there might be a conviction for fraudulent conversion (J. Ll. J. Edwards, in *Current Legal Problems* (1950), 150). The suggestion is largely based on some remarks of Lord Reading C.J. (13 Cr.App.R. at p. 157 in *R. v. Grubb*), where he

If it is doubtful whether there is criminal liability on facts such as those of *R. v. Matthews*, it is even more doubtful whether, on facts such as those of *R. v. Johnson* (*supra*), the accused could be held to have committed any crime. If one who purchases goods, without knowing that they have been stolen, converts them after he has become aware of that fact, he commits no trespass. Therefore he could not be guilty of larceny, unless he were treated as a bailee, which is most unlikely. *R. v. Johnson* decided that he would not be guilty of receiving, and it is improbable that the definition of fraudulent conversion would be held to be wide enough to cover such a case.

Accordingly, it appears that there may still be 'iniquitous' things which a man can do without infringing the criminal law which, after all, is a thing of 'threads and patches' (*Re Belencontre* [1891] 2 Q.B. 122, at p. 141, *per* Wills J., and p. 137, *per* Cave J.). So it must remain until it is codified.

The chaotic state of the present law, on some of the topics which have been discussed in this note, is demonstrated by the fact that the possession, without lawful excuse, as well as the receipt of stolen property, is a felony, under section 33 (4) of the Larceny Act, 1916, provided the property was stolen abroad. So far as the general law is concerned, the possession of property stolen in England is, on the other hand, merely a ground for a search warrant, and a summons to a police court to account for it, and then only in the limited number of cases governed by section 42 of the Act. If section 33 (4) applied where the theft occurred in England, conduct such as that with which *R. v. Johnson* was concerned would certainly not go unpunished, and the facts of *R. v. Matthews* might also be covered.

RUPERT CROSS.

said that a person may be guilty of fraudulent conversion if he 'Obtained or assumed the control of the property of another person in circumstances whereby he becomes entrusted' with it. It is, however, difficult to see how, in the ordinary case, a trespasser can become entrusted with that which he has taken, and, if the suggestion were sound, there seems to be no reason why every thief who sells that which he takes should not be convicted of fraudulent conversion.

REVIEWS

READINGS IN AMERICAN LEGAL HISTORY. By Professor MARK DE WOLFE HOWE. [Harvard University Press; London : Geoffrey Cumberlege. 60s. net.]

It is in retrospect somewhat curious that the great school of historians virtually founded at Harvard in 1870 by Christopher Columbus Langdell should have been devoted to English rather than to American history and in particular to the mysteries of mediæval law. We in this country would be ungrateful if we did not salute in Professors Woodbine and Thorne the heirs of Langdell, Ames and Holmes. But the transference of interest from English to American origins has been long overdue, and it is only in our own days that, stimulated or provoked by the work of Dean Pound, serious study has been directed upon indigenous materials. Professors Chafee and Haskins, Radin and Goebel, have shown how eagerly, and with what a pleasant incompatibility of temperament, the soil may be turned. But, to be really fruitful, the work of the individual must be supported by the technique of the research institute; and to this end the seminars conducted by Professor Howe and the source book now published are essential means.

The maker of any such book is presented with the two basic problems of selection and of continuity. Professor Howe, in his preface, has explained the reasons that impelled him to his own choice of materials. The emphasis on the law of Colonial Massachusetts, on the problems of federalism, and on the early and mid-nineteenth century movement towards codification, needs no justification. Within these chosen bounds the selection, to the unsophisticated eye of an English lawyer, is admirably suited to display the salient features of each period. It is only a question whether it is not too rich for digestion. The Winthrop papers are an unrivalled source of information—but have they perhaps been drawn upon a little too heavily? The interpretation of the Alien and Sedition Acts certainly reflects a crisis in the development of American law—but might not its significance have been marked with rather less citation? These suggestions, conceived in ignorance, are offered with diffidence. The second problem of continuity is perennial. Should an editor of 'sources' set them in a framework of narrative or should he leave the 'hapless subject' to speak for itself? Professor Howe has no hesitation in preferring the latter and sterner alternative. With case books upon current law there can be little doubt but that such is the better course: in the labyrinth of legal history the services of an experienced guide are more necessary. For the English student at least, and, it may be suspected, for those Americans who cannot enjoy the privilege of Professor Howe's seminars, the virtual denial of a connecting narrative seems to be too heroic. To allow the reader to share the editor's own reaction to the documents would have clarified their message without impairing their integrity; and the few indications of that reaction which we are permitted serve only to whet our appetite. It must be added that the difficulty of seizing the essential points of the story caused by the lack of commentary is increased by the absence of an index.

The complaint, however, is only that we do not get enough of what would clearly have been a good thing. Taken as a whole, there is no doubt of the book's success. Professor Howe has set in due perspective the opposing influences upon American legal development—on the one hand, of legislative creation as against judicial technique, and, on the other hand, of English tradition as against colonial initiative. Nothing could have been happier than to illustrate the former interplay of forces by a full account of the interesting

movements towards codification by which, on the other side of the Atlantic, the enthusiasm of Bentham was duplicated and, as some would say, translated into the language of common sense. It is a fortunate coincidence that the student of this present book can refer for comment to the recently published *Field Centenary Essays*. In assessing the respective merits of English tradition and of colonial initiative stormier weather is inevitably encountered. It is doubtless true that the reaction against a 'Blackstonian' view of American law, associated prominently with Professor Goebel, must command much support; though, if the criticism of Stubbs' disciples is just, that they regarded the English church as Protestant before the Reformation and Catholic afterwards, it may equally be permitted to question the validity of a doctrine that would make the colonial law American before the revolution and English afterwards. Nor is it without interest, in view of Professor Goebel's almost contemptuous rejection of English central justice as the precedent for early colonial law, to notice that, in *Giddings v. Brown* in 1657, Finch's *Nomotechnia* is constantly cited, while Dalton's *Justice* receives a mere passing nod of recognition. Between the vehement ardour of the 'revolutionary' school and the urbane 'orthodoxy' of Dean Pound, Professor Howe has steered his course with skill and discretion, and his selected documents should serve to temper too confident an assertion of either view. His use of footnotes throughout the volume—a touchstone of any book of sources—is singularly happy and illuminating and almost always sends the reader to the most favourable quarter for fuller information. It might perhaps be suggested that, in the chapter on English law, the scales are weighted too heavily in favour of Bacon as against Coke, who, unpleasing pedant as he was, alone among contemporaries enjoyed the professional authority to adapt old law to new conditions; and that Maitland's brilliant but dubious paper on 'English Law and the Renaissance' might have been balanced by a reference to later and compensating research. But these comments are hypercritical. The book is a most interesting venture into a field that has long awaited and seems now likely to repay cultivation, and Professor Howe may well come to be regarded as a second Langdell opening a second era in American Legal History.

C. H. S. FIFOOT.

GOVERNMENT BY DECREE. By MARGUERITE A. SIEGHART, LL.B., DR.JUR. With a foreword by C. K. ALLEN. [London : Stevens & Sons, Ltd. 1950. xxix and 343 pp. 30s.]

DICEY, it is now generally acknowledged, was guilty of a serious disservice to clear thinking when he misrepresented the characteristics of *droit administratif* (or rather, the *régime administratif*) in France. Generations of students were educated in the belief that French administrative justice, like the practice of eating frogs, was something to be regarded with curiosity but with reprobation. As recently as 1932, when the iconoclasts were busily at work, the Committee on Ministers' Powers adopted Lord Hewart's view 'that "*droit administratif*" is completely opposed to the first principles of our Constitution'. Since then confidence has given way to doubt; and interest in the French system has grown considerably. But English students have been handicapped by a shortage of easily accessible materials. There have been two or three articles in legal periodicals (one of them in this *Review*) and the ninth edition of *Dicey* included a brief but useful description by Professor David; but there has been little else in English. Few of us, unfortunately, were zealous enough to wade through the French treatises.

In these circumstances, Mrs. Sieghart has made a valuable contribution to the literature on public law by presenting a well-documented account of the structure and work of the *Conseil d'Etat* and other administrative courts. This account is subsidiary to the main theme of the work, which is devoted chiefly

to a comparative study of the history of the ordinance in English and French law. To say that her account of administrative adjudication is likely to attract wider attention than other chapters is not, however, to disparage the merits of the rest of the book. The first part of the book deals with delegated legislation in England. One is inclined to ask why it should be thought necessary to begin with a hundred pages of general constitutional history and elementary jurisprudence, ably written though they are. The question is partly answered by Part Two, which deals with France. It is impossible even to begin to understand the present state of affairs in France without having an adequate grasp of French constitutional history and constitutional theory. The comparisons that Mrs. Sieghart draws with such skill might have been less easy to follow had she taken for granted the more familiar course of development in England.

The author views the advance of collectivism with misgivings. At one point she goes so far as to assert that the 'laws of the individualistic State are based on axioms which form the foundation of Western civilisation. The laws of the social service State lack, so far, a similar backing'. She is acutely aware of the dangers of government by decree, and she is able to show how the French Legislature, by repeatedly conferring *pleins pouvoirs* upon the Executive between the wars, helped to prepare the way for the easy assumption of dictatorial but legitimate decree-making powers by Pétain. But in her justifiable insistence on the dangers of the maxim 'Trust the Executive' she omits to mention other highly important matters. Parliamentary delegation of legislative powers has its virtues, and not the least of these is that it enables Parliament to concentrate on functions even more important than the making of laws. Parliament is fundamentally a critical and deliberative assembly. The less it leaves to the discretion of the Executive, the more legislation it will itself have to pass. By trying to forestall in advance all possibility of the abuse of power it would gradually degenerate into a legislative machine; it would cease to be the grand forum for debating broad issues of principle, and the word 'Parliament' would be emptied of its historic meaning. In the last analysis the only escape from the dilemma is to advocate a movement back towards the 'individualistic State', so that less legislation will be needed. Mrs. Sieghart concedes this to be impracticable, although at the same time she quotes with approval the words of Tacitus: *Corruptissima re publica plurimae leges*. In fine, whereas the reckless delegation of legislative powers to the Executive can be a grave threat to parliamentary institutions, a very extensive delegation of those powers is, paradoxically, a condition of the survival of parliamentary institutions in modern England. Again, in discussing the safeguards against the abuse of delegated powers the author surprisingly ignores one of the most conspicuous of all safeguards—the practice of consulting interested bodies before the instrument is made, a practice which is in many cases a statutory duty. Nor is it satisfactory to find the work of the Select Committee on Statutory Instruments discussed perfunctorily in a few lines.

Mrs. Sieghart regards the Judiciary as the principal check upon the Executive, but she recognises that the Executive has shown little enthusiasm for being checked. She therefore proposes that a new administrative Court of Appeal, independent of but acceptable to the Executive, should be established, to deal with issues arising out of administrative law. It would be composed of experienced administrators as well as expert judges, and it would have wide powers to review executive action on the ground of *détournement de pouvoir*. It would, in fact, be a body comparable with the *Conseil d'Etat*. Dr. C. K. Allen, in his foreword, commends these tentative proposals to readers, and says that he too is now convinced that many such issues should be confided to special administrative courts separate from the ordinary courts, provided that these special courts approach the issues as 'matters of pure adjudication, without regard to the convenience or inconvenience of the result'.

A number of academic writers now favour the rationalisation of administrative tribunals and the conferment of a wide jurisdiction upon an administrative

appellate tribunal. It would be idle to suggest that either of these ideas makes as yet any great appeal to the Executive, or that the latter idea would be approved by the Judiciary. Nevertheless, they must sooner or later demand serious consideration, if persuasively advanced by a large body of informed opinion. Books such as Mrs. Sieghart's will help to create that body of opinion.

S. A. DE SMITH.

LAW AND THE EXECUTIVE IN BRITAIN. By BERNARD SCHWARTZ, of the New York University School of Law. [New York: New York University Press. Cambridge: At the University Press. 1949. viii and 388 pp. 45s.]

PROFESSOR Bernard Schwartz has written a book for Americans about English administrative law. Its English readers will enjoy not only the salutary experience of seeing their institutions as others see them, but also the pleasure of discovering that this is one of the soundest books yet written on English administrative law by anybody. It gives a well-balanced account of delegated legislation, administrative justice, emergency powers and judicial review of executive action. There are frequent comparisons between the English and American approaches to similar problems; and if the author generally prefers the solutions adopted in his own country, he always shows an understanding of the reasons that lie behind the aberrations of the English. Like most American lawyers, he is primarily interested in judicial review, and he is obviously disturbed by the narrowness of the scope of review in England. He believes that the American 'substantial evidence rule' should be applied to administrative determinations of fact in England, and that the test of 'reasonableness' should be applied to statutory instruments as well as to bye-laws. His criticisms of the decision in *Liversidge v. Anderson* are given additional weight by the examples he gives of the Supreme Court's attitude to wartime emergency powers in the United States. In his discussion of war measures, however, he stresses that the British Government's treatment of enemy aliens compared very favourably with the United States Government's conduct towards its Japanese citizens.

The author's main criticisms are reserved for the system of administrative adjudication by Government departments in England. He argues that the inspector who conducts an inquiry should be required to give an initial decision, subject to an appeal to the Minister; that inspectors' reports to Ministers should be published; that a Minister should never be put in the position of having to decide whether or not to confirm a draft order made by himself. These and other proposals are plainly influenced by American practice, and in particular by the principles enshrined in the Federal Administrative Procedure Act, 1946. The 'judicialisation' of the administrative process has, of course, been carried much further in the United States than here, and some of the American procedures may well be thought to impede unduly the implementation of a coherent national policy. None the less, if and when the reform of English administrative justice is given proper consideration, it will be important to bear in mind that the safeguards adopted in the United States are not generally regarded there as being inconsistent with governmental efficiency.

Professor Schwartz has maintained a high standard of accuracy with respect to the English material. Two or three minor errors occur, however, in his discussion of parliamentary control over delegated legislation, and these suggest that he is unaware of the new Standing Orders adopted by the House of Commons in November, 1947. Also, his discussion of the scope of certiorari is not altogether clear. The reason why certiorari will not lie to enable the High Court to review findings of fact (except in regard to 'jurisdictional facts') made by inferior tribunals is that certiorari lies only to review records.

In some of the old cases the Court of King's Bench did quash orders and summary convictions upon certiorari on the ground of manifest insufficiency of evidence, but it could do this only if the 'record' before it set out all the material evidence and the conclusions of fact and law drawn therefrom. Extrinsic evidence of a lack of evidentiary basis for the decision was, and still is, inadmissible. Since 1848 forms of summary convictions no longer set out the evidence, and 'speaking orders' are rare; hence findings of fact are hardly ever reviewable upon certiorari: see *R. v. Mahony* [1910] 2 Ir.R. 695; *R. v. Nat. Bell Liquors, Ltd.* [1922] 2 A.C. 128. In so far as United States, Canadian and Australian courts have allowed common-law certiorari to be used to impugn findings of fact not apparent on the 'record', they have departed from the established historical doctrine.

The book is attractively produced, but it is a pity that it could not have been published at a price more accessible to the average reader.

S. A. DE SMITH.

ADMINISTRATIVE TRIBUNALS AT WORK. A symposium edited by ROBERT S. W. POLLARD, with a Foreword by WILLIAM A. ROBSON. [London: Stevens & Sons, Ltd. 1950. xx and 154 pp. 17s. 6d.]

IN the field of administrative law we are passing, somewhat belatedly, from the period of theoretical attack and defence to the period of critical factual examination. This is not to say that the earlier theory was divorced from fact but that the arguments have stemmed from *a priori* assumptions rather than actual functionings. There has been a tendency to consider that Englishmen existed for the better working of the Constitution. A book like the one under review is a welcome change. The seven groups of tribunals which are here discussed show the diversity of the subject. Conscientious objectors, the unemployed, those in need of national assistance, tenants of furnished houses, ratepayers, property owners and solicitors are bound together by little save the covers of this book. Dr. Robson contributes a foreword and the editor an introduction.

The first chapter, by the editor, deals with conscientious objectors' tribunals. His description of their work lives up to the title of the book. The factual account is admirably interlarded with the practical experience on which he has been able to draw. The reader sees the tribunal at work. A quotation from Butterworth's *Military Service* is almost verbatim Atkin L.J. who would have been a better authority. The second part of this essay consists of an attempt to test the tribunals in the light of nineteen principles proposed by Dr. Robson in *Justice and Administrative Law*. Every student of administrative tribunals owes an enormous debt to Dr. Robson, but it is surely better to use the work of a teacher as a springboard rather than a yardstick. 'The purpose of this article', says the editor, 'is to urge that the experience of C.O. tribunals has shown that Dr. Robson's principles are sound and can be applied, that other administrative bodies exercising judicial or quasi-judicial functions should be remodelled in accordance with those principles, and that future statutes and regulations providing for administrative tribunals should have regard thereto'. This out-Robsons Robson, who wrote: 'I venture to suggest that attention might usefully be paid to (these) principles in connection with the powers and jurisdiction of administrative tribunals'. There is a great danger in binding these tribunals too closely to sets of principles. We do not think Dr. Robson meant to do so. To take one example, Dr. Robson is quoted as saying 'The hearing should as a general rule be open to the public' and the editor adds: 'The chairman of C.O. tribunals has power to exclude the public and newspaper representatives during the whole or part of

a case'. He makes no further comment, and we are left to assume that C.O. tribunals have failed to pass this test. But surely it is proper that the chairman should have this power in *this type of case*. The public is excluded from hearings before the local tribunals in National Insurance cases. We suspect Dr. Robson, as a member of the N.I. Advisory Committee, felt that this was proper in *this type of case*. We repeat: administrative tribunals deal with too diverse a collection of disputes to be moulded to accord with sets of principles though 'attention might usefully be paid' to such principles.

The second chapter is entitled 'The Administration in 1945 of some Tribunals appointed by the Minister of Labour'. It deals with Courts of Referees (Unemployment Insurance), Military Service (Hardship) Committees, Local Appeal Boards under the Essential Work Orders of 1941 and 1942, Reinstatement Committees, and Wages Councils. Much of this chapter is of historical interest only, and the author (Miss D. Scott Stokes) has added a postscript containing a very brief summary of the tribunals under the National Insurance Act, 1946. A full account of these newer tribunals would have made a more useful chapter. Some of Dr. Robson's principles are criticised. 'Dr. Robson', says the author, 'looks forward to a new type of adjudicator who will combine a legal training with training in the social sciences and economics. With all respect, the two important qualifications for a chairman are a legal training and personal experience of how the poor live, with a feeling for the dignity of the human personality, however penniless'. To this Dr. Robson might well retort 'That's what I said'. The longest chapter is by Mr. Lach on Appeal Tribunals under the National Assistance Act, 1948. This is a very full account with detailed statistics relating to the earlier Unemployment Assistance Board. The author argues strongly that the new Board and the Ministry should be formally deprived of the liberty to have their staff appointed as members of the tribunals and notes that the new Rules 'do not give evidence of an intention to give up the dominant position which the clerk has hitherto occupied'. Again, he writes 'The procedure at the tribunal, both formal and informal, is also weighted in favour of the Board'. The strict privacy of the proceedings makes detailed study impossible, but this account is thorough and persuasive.

Chapter 4 on 'Furnished Houses Rent Tribunals' by 'Adjutor' is a straightforward examination which was written in 1948. Only one of the cases which have been reaching the High Court is quoted. It is unfortunate that a note could not have been added on *R. v. Paddington and St. Marylebone Rent Tribunal, ex p. Bell London and Provincial Properties*, which was decided in April, 1949. Mr. N. A. D. Willshire contributes a chapter on the local tribunals for Rates Valuation. He deals with the old and the new structure factually and critically. The 1948 Act is clearly explained with quotations from debates in the House of Commons. The author expounds his subject and his thesis convincingly, though we are perhaps not told enough of the details of assessment committees 'at work'. Chapter 6 is on Appeals in Town and Country Planning Law and is by Mr. de Smith. Unlike some of the other chapters, this is well written. The subject, which is the most difficult in this collection, is simply and concisely explained. The criticism is reasoned and restrained to the point, one suspects, of understatement. Perhaps the author had to obtain some of his information direct from the Ministry; if so, he may have been fettered by those handcuffs which officials produce when they learn the inquirer is thinking of committing that dangerous offence known as 'writing an article'. Mr. de Smith is not afraid of following to its conclusion the fact that decisions on development are policy decisions and deals, to my mind, properly with the questions of suggested independent appellate tribunals, publication of inspectors' reports and the exclusion of the High Court. The final chapter, by Mr. T. G. Lund, concerns the Professional Discipline of Solicitors. This is a straightforward account with illustrative examples. The author is well content with the tribunal he is describing and

offers no criticism at all. It is pleasant to think that there is at least this one garden where everything is lovely.

The book concludes with an Appendix containing a list of 'Administrative Tribunals'. Within this definition are included, by the Government departments concerned, a large number of judicial powers vested in Ministers. The total list exceeds 200.

J. A. G. GRIFFITH.

THE LAW OF CARRIAGE BY INLAND TRANSPORT. By OTTO KAHN-FREUND, LL.M., DR.JUR., of the Middle Temple, Barrister-at-Law; Reader in Law in the University of London. Second edition. [London: Stevens & Sons, Ltd. 1949. xxv and 350 pp. (and index 7). 17s. 6d. net.]

THIS is a very useful book with the added merit of being, judged by modern standards, cheap.

Since Dr. Kahn-Freund adopted our old friend *Disney* in 1939 very considerable changes have taken place in the law of land carriage, and changes almost if not quite as drastic had already taken place since *Disney* had last appeared as *The Law of Transport by Railway* in 1929. Road Transport appeared and developed with startling rapidity and a whole series of statutory enactments setting up a system of licensing, commissioners and tribunals had been brought into existence. Now we have the mammoth Transport Act of 1947 with its galaxy of Executives and the Transport Commission as presiding genius. It has been inevitable in these circumstances that much of *Disney* has gone into limbo, but it is a pity that even the name should have become a back number.

The present work is not limited to railways and it is right that this should be so. In the old days the railways were not only the dominating carriers of the country, but also the occasion of much technical and complicated law entirely on their own and it became essential to have separate treatises on the subject. But inland carriage has for all that always had an essential unity as a topic of law and, although an almost equally intricate and specialised department grew up round Road Transport Law, it is certainly important, at any rate from the student's point of view, to realise this unity and to have a textbook which gives an overall picture. This Dr. Kahn-Freund has provided. As the result of extensive recasting, rewriting and new writing he has now produced an admirable survey of the whole field which will certainly meet the student's needs and will be an invaluable handbook for practitioners.

The first part of the book is now devoted to what may be called the public law aspect of the subject, with chapters on the Transport Commission and the Executives, the organisation of railways and canals, the licensing of goods' motor vehicles, the nationalisation of long-distance transport of goods by road, the licensing of passenger vehicles, the co-ordination of passenger and road transport, the law of rates and fares, railway facilities and undue preference. This occupies 114 pages and is an eminently readable summary of much complicated statute law. The exposition of the 1947 Act is particularly helpful, though one can't help feeling that some of it is rather tentative. It is one thing to explain in civilised language a section or a series of sections of an Act of Parliament, but nobody really knows how it is going to work out in practice. Indeed much of the Act itself is couched in extraordinarily vague language in order to ensure the necessary elasticity, and development in the coming years may quite possibly bear little resemblance to what the framers contemplated.

With Part 2 we enter on the more familiar field of carriage of goods. The opening chapter on common carriers and private carriers is an adequate survey of a topic which, in the author's view, 'has largely ceased to be a matter of

the living law and become a historical relic and a textbook affair'. This view is no doubt correct, but there is still something to be said for some form of control by the law over services essential to the community and there might well come a time when some form of legal process, not necessarily indictment, would be desirable even against an Executive or the mighty Transport Commission itself. Two short chapters on the contract of carriage and limitation of liability by contract lead up to the question of loss and injury during transit, which affords the author an opportunity of explaining and discussing the standard Railway Contracts at Carriers' Risk and Owners' Risk. Delay, deviation, detention and delivery are then dealt with and a separate chapter is devoted to the beginning and end of transit and through-traffic. Specialised types of carriage—valuables and breakables, animals, dangerous goods—are successively surveyed and there follow chapters on periods for claims and the rights of the carrier. A short but useful chapter on passengers' luggage, including cloakroom contracts, closes this Part.

Part 3 deals with the carriage of passengers, which involves a discussion of the law of negligence in the special circumstances applicable. This is a thoroughly sound and readable account, not only as regards types of negligence and the necessary proof, but also as regards liability for the acts of servants and the remedies available. Chapters follow on insurance (not intended as in any way a survey of the topic, but just as a pointer to its existence), delay, limitation of liability and the rights of the carrier. There is, of course, in the whole of this Part considerably more case law involved than in any other aspect of the topic and it has been necessary to be selective. The selection is good. No doubt everyone has his own special favourites when it comes to case law, but no one can criticise another for sticking to his own choices, so long as they are good, solid, reliable decisions.

Taken as a whole, the book may be strongly recommended. It is readable and lucid, accurate and up to date. No topic of importance is overlooked though some which are more exhaustively treated elsewhere are quite properly only touched on, with a guide to the reader as to where to look for more. It will take its place without question as the standard textbook on the subject and, in the absence of any other treatment outside the covers of *Halsbury*, practitioners will be well advised to keep it handy.

STEPHEN CHAPMAN.

THE LAW OF MORTGAGES. By C. HUMPHREY MEREDITH WALDOCK, C.M.G., O.B.E., B.C.L., M.A. [London: Stevens & Sons, Ltd., Sweet & Maxwell, Ltd. 1950. xxviii and 451 pp. 35s. net.]

THIS is in effect a new edition of the well-known *Hanbury and Waldock*, though for reasons indicated in the preface the title-page now bears the name of Professor Waldock alone. The general sections on mortgages have been considerably revised and rearranged—indeed, there has been perhaps more rewriting than the preface might lead us to believe—while the chapters on Bills of Sale and other special topics have been entirely rewritten.

The chapter on Bills of Sale is nearly twice as long as it was in the first edition, and contains, as the author says, 'the most substantial part of the new matter' now introduced. We confess to a feeling of disappointment on reading it. The topic, of course, does not lend itself to dogmatic lucidity, but there is something off-hand, a tendency, perhaps, to take too much for granted, in Professor Waldock's exposition which may well puzzle the reader who has not already acquired a sound knowledge of the subject. The first Bills of Sale Act is introduced in the course of a discussion of the various Bankruptcy Acts as 'the 1854 Act', without more. We have the inevitable discussion of the various documents other than bills of sale which are caught by the definition section of the 1878 Act, but nowhere are we told what constitutes a bill of sale properly

so called. That fixed power machinery is excluded from the operation of the Acts is the result of the express provision of section 5, but the reader of p. 85 will get the impression that it is in some mysterious way the logical consequence of the definition of ordinary trade machinery. The point of *Re Townsend* (p. 102) was that the creditor was given a power to seize the chattels, as well as to sell them. And how many of Professor Waldock's readers will be sufficiently familiar with 'the rule in *Spargo's Case*' (p. 110) to be able to dispense with explanation and even reference?

This and other special topics such as shares and debentures have now been removed from the end of the book to the middle, no doubt with the object of collecting together the descriptive parts of the book. We prefer the original arrangement. The present order holds up the main argument, and as far as we can judge there is no compensatory advantage, for no serious attempt is made—perhaps none could be usefully made—to link up the principles of bills and debentures and so forth with the general principles of mortgages of land. Indeed, we would suggest that for the next edition the author should consider excluding them altogether.

The real value of this work lies in its excellent treatment of ordinary mortgages of land. The present edition, as far as we have been able to judge, has skilfully incorporated the changes in the law since 1937, and there are satisfying references to recent literature, both textbooks and periodicals. This part of the work, thorough, provocative, occasionally irritating, is so well known that it is sufficient for us to welcome a new edition which presents an up-to-date picture of the modern mortgage at an intellectual level which will appeal to the mature student, including therein the better type of practitioner. We shall, however, take the opportunity of crossing swords with Professor Waldock on two small points of statutory interpretation.

Our first point shall be the meaning of the word 'protected' in the phrase 'protected by a deposit of documents relating to the legal estate'. Professor Waldock is content without much discussion to assume that the word must be construed by reference to cases such as *Dixon v. Muckleston*, where, before 1926, an equitable mortgagee who had received an out-of-date deed under the belief that she was receiving all the relevant documents was allowed priority over a subsequent equitable mortgage accompanied by possession of the title deeds. Now it is misleading to suggest that the defendant in that case was 'protected' by the possession of a title deed; what 'protected' her was the absence of negligence on her part. Moreover, she certainly would not have been 'protected' against a purchaser of the legal estate, and as section 10 of the Land Charges Act has in mind a subsequent purchaser as well as a subsequent equitable mortgagee, the word 'protected' must at the very least imply the possession of such a title deed the absence of which would put a purchaser on his inquiry. *Dixon v. Muckleston* is thus no longer law. It does not, of course, follow that this minimum degree of protection will suffice to exclude section 10, for it would still make possible the existence of several successive 'protected' mortgages, and the courts may feel confident enough to hold that the Act, by its contrast between registration and deposit, envisages one 'protected' mortgage only.

Professor Waldock has rewritten the section on priority of registrable mortgages so as to take account of the supposed conflict between section 13 of the Land Charges Act and section 97 of the Law of Property Act. It is remarkable that the problem is discussed at length without once referring to the interpretation section which, by defining 'purchaser' so as to include 'mortgagee', alone makes any conflict possible. As the text stands, an innocent reader who takes it for granted that a purchase and a mortgage are two fundamentally different transactions will completely fail to understand what all the pother is about, though of course he will be spared the shock of discovering that in the twentieth century it is still possible to argue seriously that the express provision of one Act of Parliament can be revoked by the indirect effect of an interpretation section in another. The only argument of substance in

favour of section 13—we think it better to maintain a shocked silence about Professor Waldock's method of interpreting section 97—is that to create exceptions from it would destroy the symmetry of the scheme it purports to create. But this argument overlooks the dual character of a mortgage. To the owner of the land a mortgage is an incumbrance, while to a mortgagee it is security for a debt. If the owner sells the land, the question is, Does the incumbrance continue to exist as an incumbrance on the land? If he makes a further mortgage, no question arises as to the continued existence of the earlier mortgage as an incumbrance; as between competing mortgages it is solely a matter of priority. The first type of problem is properly soluble by analogy to other incumbrances such as restrictive covenants, but the problem of priority, being fundamentally different, cannot be dealt with so simply, as will be realised by anyone who tries (as we have vainly tried) to understand Professor Waldock's attempt to solve his 'insoluble case' by tinkering with the doctrine of subrogation.

If there is ambiguity in these statutory provisions, it is proper to investigate their legislative history in order to discover the intention of Parliament. The 1922 Act, which contained the original interpretation section, extended the definition of land charge so as to include unprotected equitable mortgages, but no reference was made to the registration of legal mortgages; no doubt at that time registration was considered solely as a substitute for notice, a conception traditionally irrelevant in connection with legal incumbrances. The important changes were in the 1924 Act. By its Third Schedule, the section which was to become section 97 was inserted as an addition to section 16 of the Conveyancing Act, 1881, the sidenote of the amendment reading 'Documents and priorities'. The Sixth Schedule substituted the present list of land charges (including puisne mortgages), together with a new section, now section 13, the sidenote to which, both in the 1924 and 1925 Acts, is 'Protection of purchasers'. At this stage there can surely be little doubt but that Parliament deliberately introduced a completely new and distinct policy to govern the priority of all mortgages, both legal and equitable, consciously contrasting it with the original policy for the protection of purchasers. We certainly cannot believe that the special provision headed 'documents and priorities' was introduced into the 1924 Act with the intention of allowing it to be immediately revoked by the interpretation section of the 1922 Act. All these provisions are now contained in the 1925 legislation. Is it material that section 13 is now, for the first time, contained in an Act which has its own interpretation section? *Prima facie*, a consolidating Act does not change the law. And for those who insist on technicalities it may be as well to point out that the interpretation section applies only 'unless the context otherwise requires'. In the light of the history of these provisions it is difficult to imagine a stronger case for exclusion.

A. D. HARGREAVES.

ENCYCLOPÆDIA OF THE LAW OF PLANNING, COMPULSORY PURCHASE AND COMPENSATION. General Editor, E. J. RIMMER, B.Sc., A.M.INST.C.E., Barrister-at-Law. *Volume I, Planning*, by DESMOND HEAP, LL.M., L.M.T.P.I., Comptroller and Solicitor to the Corporation of the City of London, assisted by HAROLD J. BROWN, LL.M., Barrister-at-Law. *Volume II, Compulsory Purchase and Compensation*, by R. D. STEWART-BROWN, M.A., Barrister-at-Law. Managing Editor, JOHN BURKE, Barrister-at-Law. [London: Sweet & Maxwell, Ltd. 1949. 2 vols., £6 16s. 6d. net; supplementary service, £1 11s. 6d. per annum.]

'REPERTORIUM' would perhaps have been a more accurate title for this work than 'Encyclopædia', since it sets out to bring together all the sources of the

law and practice of planning and compulsory acquisition, and succeeds admirably in its object. Statutes, statutory instruments, circulars, practice notes, forms and planning decisions are all to be found, with the exception of the earlier planning Acts and the orders made thereunder. The principal drawback to this type of compilation is in its bulk, and this unfortunately is constantly increasing. Already some 600 new pages have been added in the first three quarterly revisions. But this drawback is more than offset by the advantage of being able to find in a single publication, which is constantly kept up to date, the actual texts of so many different types of document.

The perusal of the planning volume does arouse considerable misgivings about our present methods. Is it necessary to have a system so detailed as to require an order which distinguishes between a nursing home and a home for epileptics, a definition of 'advertisement' so wide that it has expressly to exclude anything employed wholly as a memorial or railway signal, and a code for cubing buildings? This over-elaboration has undoubtedly tended to create a feeling of frustration on the part of landowners, since local planning authorities when in doubt are apt to refuse planning permission, and the more liberal tendency of the latest General Development Order is most welcome.

It would be unfair to criticise this work for not being what it does not purport to be. It is not a connected and logical treatise, though each volume contains a substantial 'General Statement' of the law, but an annotated collection of original documents. The annotations, however, are almost entirely confined to the statutes. This is unfortunate, since some of the orders and regulations are complicated, and have constantly to be referred to, and practitioners would appreciate full notes on them. As an example, following Class V in the First Schedule to the General Development Order there could usefully be set out a list of the organisations holding the Minister of Health's certificate of exemption. The statutory annotations are for the most part adequate, without attempting to probe the more complex problems of construction and application. They show, however, in common with so many other practitioners' textbooks, an unfortunate reluctance to cite articles from periodical legal literature; thus, even on the difficult problem of the application of the time limit under section 23 (1) of the Act of 1947 to temporary planning permissions, no reference is made to the valuable articles by Mr. Heap himself and others in the *Journal of Planning Law*. The question whether that time limit also applies in cases within section 75 (1), in addition to the three-year time limit, is ignored save at p. 89 (recently added) of the General Statement. The important decision in *Holdstock v. Shepherd* (1944) 114 L.J.K.B. 9, to the effect that the action of a local authority in rating premises upon the basis of a particular use does not by implication give planning permission for that use, appears to be nowhere cited, and neither is the decision of Finmore J. in *Canty v. Henderson* (1949) 153 E.G. 442 upon the meaning of development. As originally published, in fact, few decided cases were cited, but now each quarterly revision, in the pages added to the General Statements, does summarise recent decisions.

The planning volume provides the material required by the local government officer, or the adviser of a landowner wishing to know what he can or cannot do. But it largely ignores the problems of the property lawyer and conveyancer, who is concerned with the rights and obligations inter se of two or more persons interested in the same land. The draftsman of the Act of 1947 similarly ignored these problems, with the result that the greatest difficulties arising out of the Act are likely to be found in this field. The determination of the mutual rights and liabilities of vendor and purchaser, and of landlord and tenant, in respect of planning matters is likely to be particularly troublesome, as may be seen from the decision of Devlin J. in *Edler v. Auerbach* [1950] 1 K.B. 359, though that was concerned with Defence Regulation 68CA, and not with the planning legislation. An extended section on the conveyancing implications of the Act, and the duties and responsibilities of

solicitors to their clients, might usefully be added to the General Statement in Volume I.

A work of this type and magnitude cannot easily be used by the novice. On the planning side this does not matter so much, since excellent introductory textbooks are available, and most practitioners are now familiar with the outlines and general principles of the subject. But in matters of compulsory acquisition and compensation the position is very different, and practitioners in private practice often feel at a disadvantage when opposed to clerks of local authorities. In the absence of a good introduction to the subject elsewhere, the editors should consider rewriting and considerably expanding the General Statement in the compulsory purchase volume. Another reason for doing this is that the 'annotated document' system is less satisfactory in relation to compulsory purchase and compensation than in planning matters. Since 1845 considerable bodies of case law have been built up on very exiguous statutory foundations. The law of compensation for disturbance and severance is an excellent example of this. Such a body of law cannot conveniently be expounded in the form of an annotation to section 63 of the Act of 1845. Fuller treatment of these matters is desirable, preferably in the form of a connected account in the General Statement.

The mechanics and production of the work are excellent; if we must have loose-leaf publications this is how they should be produced. Some stout end papers might, however, usefully be supplied for each volume. The Supplementary Service is a quarterly one, taking the form of new pages for insertion, either in the place of or in addition to existing pages. Already a second binder for the planning volume has been issued. In view of its size there seems to be a commendable paucity of misprints, though the last line on p. 575 of the compulsory purchase volume is an intruder.

GEORGE A. GROVE.

MODERN ADMINISTRATION AND PROBATE PRACTICE AND LAW. By A. V. RISDON and PERCIVAL HANCOCK. Second edition. [London: Sir Isaac Pitman & Sons, Ltd. 1950. lxiii and 774 pp. and index 40 pp. £6 6s.]

Risdon and Hancock is professedly intended to be for practitioners and must be judged accordingly. Certainly it contains a great deal of practical information not readily available elsewhere—the practice as to churchyard monuments is but one small example—and it gives within one volume information which must otherwise be sought among a variety of books. The advice given by the authors is wisely not restricted to setting out the bare rules of law, and added interest is given by the fact that the authors are not reticent in setting out their prejudices. It may, however, be doubted whether the present form best serves the authors' purposes. The practice of setting out *pro forma* letters interspersed with law does not always lead to quick ascertainment of the law. Indeed, in view of the present considerable price of the book, it seems that some reduction might well be made in the number of letters. There is, for example, little need for a specimen covering letter with an official search in the Land Charges Registry, and in many other cases a firm has or quickly develops its own stock letters which are equally effective. The same criticism applies to many of the forms which are reproduced.

On the other hand the summary method of citing cases by name and year only in the text, leaving the full references to the table of cases, is not, though short, the most convenient method, particularly where, as with *Re Owers*, it leads to a confusion between two cases only one of which is referred to in the table of cases. Moreover the references there given are not always those which are most useful: *Re Bridgen* will be more easily found, for example, in [1937] 4 All E.R. 342 rather than in (1942) 81 S.J. 922 given in the table; similarly the *Weekly Notes* reference, which would be more useful, is omitted

for *Re Maynard*. More serious is the fact that the terse method of citation does not always indicate the critical point. Thus at p. 37 *Re Rutter* [1907] 2 Ch. 592 certainly does not establish that a condition in restraint of a second marriage is void, the proposition for which it is cited, since forfeiture did in fact there result from just such a clause. Similarly *Ffinch v. Combe* [1894] P. 195 certainly does not demonstrate that extrinsic evidence is admissible where a testator has simply obliterated a portion of the will without any attempted substitution. On the same page and at p. 70 *Re Carrington* [1932] 1 Ch. 1, although a useful case to be cited, should surely not be quoted solely in connection with an option to purchase in a lease and nowhere in connection with shares. In a few cases such matters may be really misleading to the unwary, as for example the citation of *Re Sleeman* [1929] W.N. 16 as authority for the statement that a gift to A and his descendants may create an entail. Some reference either to section 130 of the L.P.A. or of the fact that the testator in that case died in 1870 should surely be made. The same is true of the reference to *Re Hardyman* [1925] Ch. 287, which does not show the critical effect of an intervening codicil, or to *Lowthorpe-Lutwidge v. Lowthorpe-Lutwidge* [1935] P. 151, where the significance of the case is entirely lost.

In some cases the statements in the text are themselves misleading. Thus at p. 47 it is said that on the death of a member of a class before the testator the lapsed share falls into residue, and at p. 76 a sentence makes it appear that the pre-1926 intestacy rules govern the distribution of all property of those dying intestate after 1926 without having regained their sanity. It is true that the correct state of affairs is in both cases set out elsewhere in the book but an inquirer is as likely to stop at the first statement as not. Again at p. 410 the old rules for preferential payments of wages are set out and are left unaffected by the Addenda although the new legislation is within the time limits covered by those notes. There are again matters which one would have liked more fully dealt with, such as section 35 of the A.E.A., which must surely be rated as of practical importance.

These and similar points which could be raised are not intended as captious criticism of minutiae but are mentioned because they appear to affect the practical value of the work. Ease of reference and clarity of statement are, it seems, essential to that value, particularly in a busy office. When all is said, however, the substantial merits of the book in its scope remain and there will be few who cannot profit by it.

J. D. B. MITCHELL.

PRIDEAUX'S FORMS AND PRECEDENTS IN CONVEYANCING. 24th edition in three volumes by J. BROOK RICHARDSON, M.A., LL.B., of the Middle Temple and Lincoln's Inn, Barrister-at-Law. Volume I. [London : Stevens & Sons, Ltd., The Solicitors' Law Stationery Society, Ltd. 1948. £3 net.]

A new edition of *Prideaux* is always welcome to the conveyancer, but it seems a pity that the preparation of the present volume was not postponed. The preface is dated June, 1947, and accordingly the precedents and notes take no account of the changes since brought about by the Town and Country Planning Act, 1947, and the Agriculture Act of the same year. Less excusable is the perfunctory way in which the legislation of the war years has been dealt with. The Table of Statutes only records thirty references to sections of Acts (as distinct from Measures) passed since August, 1939. No assistance is afforded to the practitioner confronted with such modern problems as the drawing of special conditions on the sale of freehold land which was formerly subject to a long lease which has been disclaimed, or in respect of which a conditional notice of retention has been served, or of property which has suffered war

damage, or is held under requisition. There is no precedent of a conveyance of property belonging to an enemy. Finally, in common with other books of precedents, this volume in no way reflects the extent to which present day conveyancers are concerned with matters of compulsory acquisition. The relevant precedents nearly all relate to acquisition by railway companies, and there are only three references to the Acquisition of Land (Authorisation Procedure) Act, 1946, and these only give the name of the Act, and do not indicate its provisions. The whole of this section needs to be radically revised, extended and brought up to date.

Since the foregoing review was written a Supplement of twenty pages has been issued, dealing with the Town and Country Planning Act, 1947.

GEORGE A. GROVE.

A GUIDE TO THE LAW OF TRUSTEE SAVINGS BANKS. By C. L. LAWTON, M.SC.(Econ.), Barrister-at-Law. [London: The Savings Banks Institute. 1949. 390 pp. (with index).]

THERE has been a substantial increase in the business of trustee savings banks of recent years, and the number of officers employed in them must have risen also. Yet there has not, until the appearance of the present work, been a textbook available on the legal aspects of savings banks work, and they are, of course, allimportant. Students have been thrown back upon Watt's *Law of Savings Banks*, an invaluable collection of statutes and decisions but not in the ordinary sense a textbook. Mr. Lawton's work should therefore meet a long felt want, though it does so at a rather more advanced level than we should have thought advisable for the officers of the savings banks for whom it is presumably intended: they will find it full of meat of a rather indigestible kind. The authority of most of the statements made is statutory, and adequate quotations are given. Such case authority as is cited is not effectively dealt with, and no references are given beyond the year of decision. In the case of decisions by the registrar citations are rather more adequate, but even so will be puzzling to an outside reader. The book would have been clearer if Mr. Lawton had described his *modus operandi* in his Preface.

It is to be presumed that the savings banks officers for whom the book seems to be intended will have already received a thorough grounding in the general principles of common law and equity, otherwise they will find the book hard going, and as to some parts possibly unintelligible. Mr. Lawton might with advantage have explained his objective a little more clearly in his Introduction, which is as technical as the rest of the book, and perhaps indicated the sort of groundwork knowledge which is required before the work can profitably be used. It seems not improbable that some readers misled by the title of the book will find that they have purchased something a good deal more advanced and indigestible than they had expected and hoped for.

C.

LEGAL DECISIONS AFFECTING BANKERS. Vol. IV, 1924-1936. Edited and annotated by JAMES WYLIE, C.B.E. [London: Blades, East and Blades, Ltd. 1949. xiv and 505 pp. (with index). 15s. net.]

THE successive volumes of *Legal Decisions Affecting Bankers* which appear under the sanction of the Institute of Bankers, have been of great value to all serious students of banking law, and must be almost indispensable to those engaged in the practical business of banking. The late Sir John Paget, K.C., whose knowledge of the subject was unrivalled, prepared the

earlier editions, and on his death the late Mr. James Wylie, whose outstanding abilities never obtained the recognition in the profession which was their due, took over the work. The present volume was completed before the outbreak of war during the course of which Mr. Wylie died.

For those unfamiliar with the earlier volumes it may be useful to describe shortly the method adopted by the editors. The cases are digested in chronological order. References to the series of law reports in which the case is fully reported are given, and a brief editorial note is appended. One of the great values of these volumes is that much care has been taken to include cases of substantial legal interest which are only reported in trade papers or journals, or which are even not reported at all. All direct banking cases of legal interest are included, and also a certain number of important cases on points of indirect interest, e.g., trusts, agency, company law. The more important cases such as *Lloyds Bank, Ltd. v. Savory & Co.* [1933] A.C. 201, and *Greenwood v. Martins Bank, Ltd.* [1933] A.C. 51, are dealt with in some detail, and in cases where the judgments in the lower courts are of special interest they are referred to also; the less important cases are given with commendable brevity.

It needs only to add that Mr. Wylie's work on this volume stands up very well to the high standard that was set for him by Sir John Paget. He was rather more conservative in his approach than Sir John, and his notes are perhaps not quite so stimulating as the latter's, but they are of sustained accuracy and clarity, and one can only express one's regret that he did not live to edit further volumes.

C.

THE NATZWEILER TRIAL. Edited by A. M. WEBB. War Crimes Trials Series. Vol. 5. [London: Hodge. 1949. 233 pp. 18s.]

It is now four years since the end of the war and many people may feel that more than enough has been heard of atrocities committed by the enemy, particularly as so many have been reported that the 'novelty' has worn off. Such people should be reminded of the statement made by the Attorney-General in his Foreword to *The Natzweiler Trial*: 'Frequency did not make these atrocities one whit less terrible. Murder remains murder, although repeated a millionfold'.

For persons living in England, both lawyers and laymen alike, *The Natzweiler Trial* is of special interest. This concerned the trial of ten officials of the Natzweiler concentration camp who were accused of complicity in the murder of four Allied women captured in enemy occupied territory while wearing civilian clothes and acting as wireless operators for the Resistance movements. In the indictment they were described as being British women, although it transpired during the trial that one was French, two were British, while the fourth was unidentified and of unknown nationality.

These women had been sent to Natzweiler camp, which was a camp for men, and within a few hours of their arrival they had been given an injection, which either killed them or rendered them unconscious, and cremated. The doctor who had injected one of them was among the accused and maintained that the injection had killed almost instantaneously. His defence lay in superior orders. He maintained he had protested against this action—'I was astonished. . . . I explained to them that the job of a doctor was not to destroy but to preserve life. . . . I was then ordered'—but when ordered to carry it out consoled himself with the thought that a fatal injection was more humane than hanging. Nevertheless, he agreed that he never checked what serum he was injecting or whether, in fact, it was a fatal dose. His counsel's argument that his case depended on his knowledge of the lawfulness of the order he received is somewhat hollow. For, in the accused's own words,

'the job of a doctor was not to destroy but to preserve life', and it is not part of his function to act as State executioner.

There was little difficulty as to the facts, although there was some difference of opinion as to who was present at the killing. The accused changed their stories between the time of swearing their preliminary affidavits and giving their evidence. In court the usual line of defence was that the speaker himself was absent on duty, while one of the others was responsible. It is amazing that anybody holding a responsible position could believe that military judges would accept the contention that he knew nothing of what was going on in his own camp, when every prisoner in the camp was talking about it. Even the Commandant's defending counsel was constrained to remark in his closing address: 'It is quite amazing that Ganninger (the acting Commandant on this particular occasion who was supposed to have been most directly concerned in these murders, and who had conveniently committed suicide) should have said nothing to his Kommandant of this important matter which had taken place'.

The defence maintained that the four women were spies executed after sentence, it being alleged that there need be no formal trial for, so it was argued, the requirement of Article 30 of the Hague Rules that no spy shall 'be punished without trial' merely requires sentence before execution. In this connection it was pointed out by the Judge Advocate in his summing up that as the deceased were not engaged in sabotage or collecting information, there was some doubt whether they were spies and, therefore, all the more reason for holding a trial. In fact there was no evidence that the women were ever informed that they were to be executed. If there had been no trial, then obviously there could have been no possibility of any of the accused carrying out a lawful order.

From the standpoint of the lawyer the most interesting parts of this Report arise in connection with the nature of the evidence admitted. It is laid down by the Royal Warrant concerning Regulations for the Trial of War Criminals, 1945 (reproduced as an Appendix) that the rules of evidence are not those of a normal English trial. Even unsigned documents and hearsay may be admitted. Nevertheless, it is a little strange to find such statements as the following being accepted. In the affidavit of one of the accused submitted by the prosecution there appeared the statement: 'A French prisoner was able to speak to them. He told a German prisoner from Cologne, who told me that they had said . . .' (p. 82). On another occasion a prosecution witness, this time a British officer who had himself carried out missions similar to those fulfilled by the deceased, was giving evidence as to the absence of trials, and said 'I know it from friends who came back from concentration camps and told me' (p. 108). Not even the Judge Advocate's summing up is free from hearsay—in fact, at times his summing up reads more like the statement of a judge addressing a jury than a Judge Advocate summing up at a court martial. When referring to the evidence of the Intelligence Officer responsible for briefing the deceased, he quoted her statement of the experiences of Mrs. Sansom, G.C., who was captured in like circumstances and was never tried. It would not have been unreasonable to expect that this gallant lady should have given evidence on this matter herself, either in person or by way of affidavit.

It must not be imagined that loose rules of evidence were applied only on behalf of the prosecution. On the fourth day of the trial, counsel for one of the accused, who was in fact acquitted, asked him if it were true that 'a few days ago you told me that . . . ?' Since this was the first occasion on which the accused had made any statement in court, this particular remark must have been made during briefing.

This volume in the War Crimes Trials Series is more usable than those that have preceded it. This is not merely due to the fact that the trial was

of short duration, but there is a useful Index appended. It is to be hoped that all future volumes in the series will be similarly equipped.

There is a lesson for today to be learnt from *The Natzweiler Trial*, for, in the words of the Attorney-General, 'these crimes . . . were part of that system which arises when the totalitarian State submerges the fundamental rights and destroys the dignity of man'.

London.

L. C. GREEN.

THE FALKENHORST TRIAL. Edited by E. H. STEVENS. War Crimes Trials Series, Vol. 6. [London: Hodge & Co. 1949. xliii and 278 pp. 18s.]

GENERAL OBERST Nikolaus von Falkenhorst was Commander-in-Chief of the German forces in Norway from the date of the invasion until 1944. In July and August, 1946, he appeared before a British military court sitting at Hamburg for the trial of war criminals. In view of the fact that the alleged crimes had been committed in Norway, and had affected both British and Norwegian subjects, a Norwegian army officer was among the members of the court. The charges arose from the treatment meted out by troops under Falkenhorst's command to Allied personnel taking part in commando raids against the Norwegian coast and against German shipping in the Norwegian fiords. For this reason the three British members of the court, apart from the President, Major-General Playfair, represented each of the three services.

General Falkenhorst was charged with transmitting Hitler's notorious 'commando' order of October, 1942, to the forces under his command, as a result of which Allied prisoners captured on such operations were handed over to the *Sicherheitsdienst* (S.D., Security Service) by whom they were killed. He was also charged with reissuing this order in 1943, and another in 1944 ordering his troops to deprive certain prisoners of war—Jews—of their rights under the Geneva Convention of 1929. Of these charges, Falkenhorst was found guilty and condemned to be shot, but the confirming officer commuted this sentence to one of imprisonment for twenty years.

As has been usual with most war crimes trials taking place in Europe, Falkenhorst pleaded that he was only obeying the orders of the head of his State, and was therefore not guilty of the charges against him. The German Military Code of Justice of 1940, while recognising the validity of this defence, laid down in Article 47 that a person obeying a superior's order which he knew to be of a criminal character was liable to punishment as an accessory. That Falkenhorst was not satisfied as to the compatibility of Hitler's extermination order with international law was made clear by his own statements and by those of each of the officers called in his defence. He attempted to justify himself by saying that even Hitler must have known of the doubtful nature of the order, and, therefore, before its issuance he and Keitel must surely have convinced themselves of its compatibility with the international law of war. The prosecutor answered this argument merely by pointing out that no head of State can unilaterally abrogate the rules of international law and replace them by what would otherwise have been palpably illegal orders.

The main allegation against Falkenhorst concerned the wording of the Hitler order as issued by him. As originally sent from the Führer this provided for the total extermination of all persons participating in commando raids, to whom it was forbidden to give quarter. In an explanatory statement Hitler also said: 'Should it prove advisable to spare one or two men in the first instance for interrogation reasons, they are to be shot immediately after their interrogation'. On the face of this document it

appeared as if circulation was confined to commanders. Falkenhorst, however, embodied it into the order he issued to his troops, and altered this sentence to read: 'If a man is saved for interrogation he must not survive his comrades for more than twenty-four hours'. The accused maintained that the Führer's order was incomplete without this explanatory order, which had clearly to be transmitted to the troops. He justified his alteration by saying that this was in mitigation of the immediate character of the original order, only to find the prosecutor replying that nothing in Hitler's order said that the interrogation had to be immediate.

The main argument for the defence was that the commando raids against Norway were not normal military operations, but demolition activities carried out by 'saboteurs', and, since the Hague Convention made no reference to 'saboteurs', such individuals, it was alleged, were not entitled to the treatment normally accorded to prisoners of war. According to the laws of war even persons accused of war crimes are entitled to a trial before execution, but none of the commandos whose deaths formed the substance of the charges against Falkenhorst had ever appeared before any sort of tribunal. The verdict of the court became clear once the defending counsel conceded that 'if the court insist that he should have convened a court-martial, then he must be found guilty'.

Lawyers brought up in the traditions of English law must be critical of the rules of evidence applied in war crimes trials. In this case most of the prosecution evidence was by affidavit, although a number of the deponents were, at the time of the trial, resident in England and could easily have attended the court. The dangers inherent in such evidence were, perhaps, not so important in this case; for, as we have pointed out, once it was shown that a trial should have been held before any prisoner was executed, the decision of the court was obvious and no evidence could have altered it.

The editor of *The Falkenhorst Trial*, who is unfortunately now dead, was chosen for his task partly because he was Second-in-Command of the R.A.F. Occupational Forces in Norway. Undoubtedly, this gave him an added interest and insight into the background of the events and the trial ensuing therefrom. His Introduction, however, leaves one with the feeling that there is something amiss with the general over-all editorial policy of the series. The reviewer would like to suggest to Sir David Maxwell Fyfe as the general editor that with future volumes an attempt should be made to persuade the prosecutor or the judge advocate in the particular case to edit the volume. If this should prove impossible the task should be entrusted to a lawyer who has some experience of the practice of military courts, and, whenever possible, to one who is also an international lawyer.

L. C. GREEN.

LAW OF PRIZE. By C. J. COLOMBOS. [London : Longmans, Green. 1949. 421 pp. 30s.]

THE second edition of Dr. Colombos's *Law of Prize* was published in 1940, shortly after the Second World War had commenced and before the various Prize Courts had got into their stride. The present edition contains references to some 150 new decisions, but in the main it may be said that the Prize decisions of the recent war have not carried the law very much further than it was left after 1918. The broad outlines of prize law were by then made clear, and the courts were, from 1939 to 1945, occupied mainly in polishing and applying the earlier principles.

The present edition of the *Law of Prize* is a useful *vade mecum* so far as the Prize Courts of Great Britain, the British Commonwealth, France, Germany, Italy, Austria-Hungary, Japan, Siam, the United States and Imperial Russia are concerned. A study of the principles applied by these tribunals impresses

one by the consistency with which they have tended to approach similar problems. Prize Courts, as Dr. Colombos reminds us, are municipal tribunals and are bound by municipal law; nevertheless, allowing for certain deviations, there appears to be a *jurisprudence constante* underlying their entire practice.

Anyone writing on the law of prize must draw attention to the illegalities of German naval warfare. Dr. Colombos cites the comments of the Nuremberg Judgment on sinkings by German U-boats: 'If the commander cannot rescue, then under its (the London Protocol of 1936) terms he cannot sink a merchant vessel, and should allow it to pass harmlessly before his periscope'. What the learned author has not pointed out is that in the very next paragraph the Tribunal said it would not assess Doenitz' guilt for submarine warfare in view of the unrestricted warfare carried out by the Royal Navy in the Skagerrak and by the Americans in the Pacific (Cmd. 6964, 1946, p. 109). The fact that the Allies have, in both World Wars, tended to obey the laws of naval warfare is no reason to pass over their breaches in silence.

The last chapter of Dr. Colombos's book is devoted to a plea for an International Prize Court. He points out how necessary it is to take prize decisions out of the field of municipal law. It is rather surprising, therefore, to find that he makes no reference to such cases as *The Cysne* (1930), in which a German-Portuguese Arbitral Tribunal considered the legality of the sinking of a neutral prize; *Katrantsios v. Bulgaria*, decided by the Greco-Bulgarian Mixed Arbitral Tribunal in 1926, or *The Mechanic*, which came before the Claims Commission established in 1885 between the United States and Venezuela. Similarly, when discussing angary and requisition, Dr. Colombos ignores the *Norwegian Claims Case* (1922) and the *Finnish Shipping Claims* against the United Kingdom (1934). Even when discussing the illegalities of German naval warfare he makes no reference to *The Peleus Trial*, which came before the British War Crimes Court at Hamburg in 1945.

However, for those who wish to find the principles of prize law as they have been determined by various municipal prize courts, the present edition of Colombos's *Law of Prize* is wellnigh indispensable.

L. C. GREEN.

GRUNDZÜGE DER NEUEREN PRIVATRECHTSGESCHICHTE. By ERICH MOLITOR, Professor at the University of Mainz and President of the Supreme Industrial Court of the Land Rhineland-Palatinate. [Karlsruhe: Verlag C. F. Müller. 1949. 109 pp. 3.80 DM.]

ONE of the most remarkable reforms of the programme of studies at the German Law Faculties in recent years is the introduction of a special course of lectures on recent legal history. No doubt, this is a very welcome change. It is to be hoped that in due course it will rescue studies in legal history from the antiquarian trend which both Romanist and Germanist research has taken during the last fifty years. The first signs of such a new direction of historical research have in fact become noticeable. But, whatever the future of historical research may be, students are already now requiring textbooks covering the new field. Professor Molitor's present book, which deals with the recent history of private law, is intended to fill this gap together with two other works by the same author, one on the recent history of constitutional law and one on the influence of social and economic doctrines on law. His book therefore constitutes a pioneer work. Although the learned author in his preface rightly points to the difficulties facing a task like this at the present stage of historical legal research, there can be no doubt that he has written a most readable, highly informative work, which should help in making students more conscious of the fact that legal science is more than a mere

technique and law more than a set of rules issuing casually from arbitrary sources.

Perhaps the most attractive feature of this little book is that it is throughout written on a comparative basis. It is in fact a small-size historical introduction to the European legal systems. English lawyers may perhaps resent the fact that English law appears here not as rival on equal terms to the Continental legal systems, such as an English legal historian would like to see it, but as the great outsider on the European scene. But Professor Molitor was writing as a legal historian covering in the main the period before the rise of the U.S.A. and the British overseas territories and for this period his viewpoint is probably preferable to that which we would adopt for the last fifty years. Nevertheless, one might have liked to see a reference to more recent events in the U.S.A. A new edition, which will, no doubt, soon be required, should not pass over the American sociological school or the Realists. But nobody can write a brief abridgment without leaving some important aspects out of account. The learned author has certainly performed no mean feat in compressing into little more than 100 pages an elegantly written account of the legal history of the European world during the last 400 years. His readers will look forward to studying the two companion volumes by which he has promised to complete the picture.

E. J. COHN.

CASES ON THE CONFLICT OF LAWS. By R. H. GRAVESON, PH.D., S.J.D., LL.M., Barrister-at-Law, Professor of English Law in the University of London. [Sweet & Maxwell, Ltd., and Stevens & Sons, Ltd. 1949. xx and 659 pp. £2.]

It is not proposed to treat this review as a peg on which to hang an argument for or against the use of students' case-books, but simply to indicate whether or not this is a good example of its kind. As would be expected in the light of the author's familiarity with this subject and with American case-books, the answer is 'yes'. The cases, ninety-seven in number, are well selected and at least one judgment in each case is given virtually in full. These are supplemented by the few statutory provisions of importance. Moreover, the chief objection to case-books (that they do the work which the student should do himself) has been met by the omission of headnotes and by the reduction to the minimum of explanatory footnotes (which, however, though brief are clear and helpful). The result is a book which can be recommended with confidence.

L. C. B. G.

THE INSTITUTIONAL TREATMENT OF DELINQUENTS. THE NINTH CLARKE HALL LECTURE. By SIR ALEXANDER MAXWELL, G.C.B., K.B.E. [London: The Clarke Hall Fellowship. 1s. post free.]

THERE are those who regard all discussion of the theories of punishment as a purely abstract exercise. Nothing could be further from the truth, as this pamphlet shows; for the acceptance or rejection of any one theory must fundamentally determine the day by day work done in our prisons and in the increasing number of special institutions set up to deal with criminal offenders.

Everyone is agreed that punishment is not an end in itself, but no single theory of its purpose will fit English law, which veers between the retributive, the deterrent and the reformatory schools of thought. Our criminal law cannot be regarded as purely retributive, for it inflicts, in cases of social danger, penalties out of all proportion to the moral blame, and here and there even without any moral blame. It is not strictly deterrent, for it does not accept necessity and compulsion as a defence; nor can the existence of capital

punishment, to mention only one point, be considered compatible with the belief that English law is firmly governed by the reformatory theory.

In fact our law is based on a mixture of all three theories of punishment and in the present state of our knowledge that may well appear as a reasonable point of view for the substantive law to take. For the administration of our prisons, however, this attitude produces an atmosphere of divided counsel which cannot but be detrimental to the success of any one aim of punishment. With all the authority of many years' experience at the Home Office, Sir Alexander Maxwell, in the *Ninth Clarke Hall Lecture*, says: 'Today . . . we cannot escape the conclusion that punitive methods of treatment are *irreconcilable* with any policy of training offenders'. He suggests that training and reformation are impossible without some measure of response and co-operation from the criminal, and that this cannot be stimulated if, in addition to the deprivation of personal freedom and subjection to disciplinary control (in themselves already sufficiently grave), further hardships and afflictions are intentionally imposed for punitive purposes.

Shutting men up in solitary cells, without work and with nothing but the Bible to read, did not succeed in fitting them for civil life. There is no guarantee that the reformative measures, free from hatred and vexation, which are now envisaged will help to give criminal offenders some fundamental moral principles on which to build their future lives. But surely the attempt is worth making, and it is not one which can be judged by incidental shortcomings, nor one which should be expected to yield immediate and spectacular results. Above all it is an experiment which requires a break with the prison traditions of the past and the whole-hearted co-operation of prison governors and staff who are at present working under grave handicaps. Sir Alexander Maxwell speaks with reasoned optimism of the great changes in the methods of treatment for criminal offenders which have been brought about during his own period of service at the Home Office; it is hard to understand those who already speak of failure before this effort to deal with a grave problem has even properly got under way.

H. A. HAMMELMANN.

THE TRIAL OF JAMES CAMB. Edited by GEOFFREY CLARK. Notable British Trials Series, Vol. 71. [London: William Hodge and Co., Ltd. 1949. xii and 255 pp. 15s.]

THE latest addition to the Notable British Trials series is the transcript of the trial of James Camb, steward of a Union Castle liner, for the murder of Gay Gibson, a young actress. Under the not-so-glamorous slug 'The Port-hole Murder', this case with its combination of crime and sex excited even more than customary public curiosity in the annals of infamy provided with unflinching regularity by certain Sunday newspapers; interest was further fanned by the distasteful but, in such a case, inevitable task of the defence of trying to destroy the reputation of the dead girl. Apart from the fact that Camb was tried, and eventually convicted of murder, although he had disposed of the body of his victim on the high seas and no trace of it could be recovered, the case did not, however, present any outstanding features of difficulty or interest either in fact or in law. Much time at the trial was taken up by scientific evidence of four expert witnesses, two on each side who endeavoured to reconstruct the cause of death from the few data available. Fortunately, broad agreement was reached that, while natural causes could not be altogether excluded, death was at least very likely, or almost certainly due to strangulation, and in view of the wealth of other circumstantial evidence available against the prisoner, the jury were thus spared the uncongenial task of having to make a choice on medical matters dead against the reasoned opinions of one set of experienced medical men or the other.

Though sentenced to death, Camb was not executed because his trial took place during the period when Parliament was in two minds about the 'no hanging' clause in the Criminal Justice Bill.

The introduction by Mr. Geoffrey Clark gives a full and clear account of the trial, though it does not always escape the lure of the melodramatic.

H. A. H.

THE CHALLENGE OF CONSCIENCE. By DENIS HAYES. [London : George Allen and Unwin, Ltd. 1949. xvi and 406 pp. (with index). 15s.]

ALTHOUGH it is written in an unattractive manner, and the arrangement of the material is not always successful, this book provides a very useful historical account of the relationship of the State and the conscientious objectors during the period of the last war. The author played a prominent part in the events which he describes, and the story is told with a definite bias towards the side of the conscientious objectors. It is not that the narrative is inaccurate, but the author's temperament seems to prevent his giving due credit to the quite unparalleled generosity of treatment which the British community, for many months on the edge of defeat, without allies, bombed from the skies, and gravely menaced from the sea, continued to extend to a quite substantial section of its members who for reasons of conscience found it impossible to stand shoulder to shoulder with their fellows. The world has not seen anything quite like it before, but Mr. Hayes seems to think that it was all based on enlightened self-interest, and calculations that it would pay better to leave the objectors alone than to try and conscribe them for the war effort. Mr. Fenner Brockway, whose recollection goes back to the very different attitude which prevailed during the first war, gives a much more generous appreciation in his foreword. Again the unsympathetic tribunals loom much more largely in these pages than the fairer ones, so that the reader of years to come will get a picture of hearings distinctly darker than is warranted by the mass of the decisions, though it must be admitted that this would have been very difficult to avoid, since the bad cases naturally attracted most attention.

Nevertheless, there is a great deal of valuable material collected together in the pages of the book; and particularly in some of the statistical material in the appendices. Mr. Hayes not only deals with the political and legislative material and the administration of the law by the tribunals on appeal, but he gives an account of the part which many objectors played in civil defence, and allied services, and of the work of national value which others of them carried out, also of the attitude and fate of 'the extremists of peace'.

No doubt when the war has receded into a more remote perspective it will be possible for a professional historian to produce a more objective and better constructed narrative. Until that time comes, Mr. Hayes' effort, with all its faults, will no doubt prove indispensable to those who desire some account of this aspect of the war.

C.

SECOND THOUGHTS ON LIFE, LAW AND LETTERS. By A. L. POLAK. [London : Stevens & Sons, Ltd. 1949. x and 134 pp. 6s.]

MR. POLAK's name is not new to those who seek enlightenment on the lighter—or should it be the more complex?—aspects of the law. His three volumes on *Legal Fictions* already rank with Sir Alan Herbert's *Misleading Cases*. In the present volume he has taken some of the recent cases and *Times* news items that have struck him as possessing a strange and amusing facet from the point of view of the law.

Second Thoughts on Life, Law and Letters contains some two dozen essays of this character, but in a review of this kind it is only possible to mention one or two of them. The discussion in the Church Assembly concerning the Bishops (Retirement) Measure caused the author to ponder on certain 'Ancient Authorities'. Among a number of biblical examples he deals with Adam and Eve in the Garden of Eden and points out that while Eve would not, by taking the apple from the Tree of Knowledge, have been guilty of common law larceny, she would have committed statutory larceny, in which offence the serpent was clearly an accessory before the fact, if not a principal in the second degree. As regards the expulsion from the garden, he is of opinion that Adam and Eve had broken the terms of their tenancy and had merited eviction.

Most readers will recall the excitement caused when, within the space of a few weeks, two men climbed the statue of Eros in Piccadilly Circus. Mr. Polak considers these acts to have been a grave insult to the gods, and expresses surprise that they were not met by divine vengeance. 'But this is a decadent age; the post has been stormed, not by Jove Pluvius but by jovial police, and the arrows of retribution have struck the offenders, not dramatically, from magic bow, but prosaically, from magisterial Bow Street'.

Many of Mr. Polak's papers are illustrated by amusing cartoons drawn by Mr. Starke of *Punch*. Perhaps the most entertaining of these is that carrying the legend 'Preferring the cats to him', and illustrating the 1948 case in which a wife, so it was alleged by the husband, preferred her cats to him, a situation which the Court of Appeal, upholding Cassels J. regarded as amounting to constructive desertion.

L. C. GREEN.

TAXATION APPEALS (No. 17 of Oyez Practice Notes). By S. M. YOUNG, Barrister-at-Law and Assistant Solicitor of the Inland Revenue, with a Foreword by TERENCE DONOVAN, K.C., M.P. [London : The Solicitors' Law Stationery Society, Ltd. 74 pp. 5s. net.]

THIS short work can confidently be recommended to all practitioners engaged in controversy with the Inland Revenue authorities regarding their clients' liability to income tax, the excess profits and profits taxes or estate duty.

The work is devoted chiefly to the conduct of income tax, etc., appeals before the General and Special Commissioners of Income Tax. The relevant statutory law and forms are fully set out and a noteworthy part of the work is that devoted to the jurisdiction of these two bodies of Commissioners. Perhaps the most valuable section is No. VIII, 'Some Notes on the Conduct of Appeals'. No practitioner who has to appear before these Commissioners can afford to neglect the often very worldly advice given therein, a remark which equally applies to those appearing on behalf of the Crown.

A. FARNSWORTH.

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